FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OCTOBER 1988
Volume 10
No. 10

DECISIONS

OCTOBER 1988

There were no Commission decisions issued in October.

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10-27-88	Westrick Coal Company	PENN	88-119	Pg. 148
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OCTOBER 1988

There were no cases filed in which review was granted in October.

Review was denied in the following cases during the month of October:

Charles H. Sisk v. Charolais Corporation and E.R. Mining, Inc., Docket No. KENT 87-212-D. (Judge Melick, August 22, 1988)

Sec. of Labor, MSHA v. Rivco Dredging Corporation, Docket No. KENT 87-147, etc. (Judge Maurer, September 8, 1988)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280 1244 SPEER BOULEVARD
DENVER CO 80204

OCT 4 1988

LOCAL UNION NO. 8622, DISTRICT 22, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. WEST 87-212-C
	:	Castle Gate Portal No. 5 and Mine No. 3
v.	:	
CASTLE GATE COAL COMPANY, Respondent	:	Mine ID No. 42-01202

DECISION DISMISSING PROCEEDINGS

Before: Judge Cetti

On September 23, 1988 the United Mine Workers of America (UMWA), on behalf of Local Union 8622, moved to withdraw its Complaint for Compensation filed in the above-captioned proceeding. In support of its motion, complainant states that the affected miners have been compensated.

Accordingly, complainant's motion is granted and this proceeding is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

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OCT 6 1988

JOSEPH T. BOSGAL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 88-119-DM
v.	:	
	:	MD 87-08
JOE KIRCHER,	:	
	:	
and	:	
	:	
AMERICAN MINE SERVICES, INC., Respondents	:	

ORDER OF DISMISSAL

Before: Judge Morris

A prehearing conference in the above case was held on August 2, 1988 in Grand Junction, Colorado. The hearing on the merits was subsequently set for October 25, 1988.

On September 14, 1988 complainant filed a letter stating he was dropping all charges against American Mine Services and Joe Kircher.

The above respondents are the only remaining parties to the case and I consider complainant's letter to be a motion to dismiss his complaint of discrimination.

Accordingly, the following order is appropriate:

1. The hearing scheduled in Grand Junction, Colorado for October 25, 1988 is cancelled.

2. The case is dismissed.

John J. Morris
Administrative Law Judge

Distribution:

Mr. Joseph T. Bosgal, P.O. Box 213, Montrose, CO 81402 (Certified Mail)

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FALLS CHURCH, VIRGINIA 22041

OCT 7 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of BRIAN BOSCH, Complainant	:	DISCRIMINATION PROCEEDING Docket No. SE 88-18-D BARB CD 87-4 No. 4 Mine
and	:	
UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor,	:	
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

The respondent's unopposed Motion to Dismiss is granted. the parties agree that this case is controlled by the Commission decision in Secretary on behalf of Beavers etal. v. Kitt Energy Corporation WEVA 85-753-D and no appeal has been taken from that decision. This case is therefore dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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OCT 13 1988

WESTMORELAND COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. VA 88-49-R
	:	Citation No. 2965807; 5/16/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Bullitt Mine
	:	Mine ID 44-00304
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 88-58
	:	A.C. No. 44-00304-03598
v.	:	
	:	Bullitt Mine
WESTMORELAND COAL COMPANY, Respondent	:	

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring, Washington, D.C. for the Contestant/Respondent; F. Thomas Rubenstein, Esq., Big Stone Gap, Virginia, for the Contestant/Respondent; Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent/Petitioner.

Before: Judge Maurer

In these proceedings, Westmoreland Coal Company (Westmoreland) is contesting the validity of a section 104(a) citation purportedly issued by Inspector Kenneth L. Card on May 16, 1988. Pursuant to notice, the case was heard on September 19, 1988 in Abingdon, Virginia.

At the conclusion of the Secretary's presentation of her case, I granted the Contestant's motion, essentially made pursuant to FED. R. CIV. P. 41(b), that the Secretary had not made out a prima facie case because she could not get a copy of the citation at issue into evidence.

This rather strange turn of events started out routinely enough. Government Exhibit No. 8 was marked and identified by Inspector Card as the citation he wrote the operator for failure to submit an accident report to MSHA. It was offered into evidence and received without objection--at least initially.

During cross-examination of Inspector Card, it became obvious that the citation marked and received as Government Exhibit No. 8 was different in a few respects from the citation that Westmoreland had contested, and that I held in my file appended to the Notice of Contest. Significantly, one of the gravity marks and the negligence mark were altered.

A brief recess was had while counsel for the Secretary investigated the apparent discrepancy. When we went back on the record, she represented that she had spoken to someone at the Norton office who told her that the original citation on file there had been whited out in the aforementioned two places and improperly altered.

In the meantime, Respondent's counsel had now objected to the relevancy of Government Exhibit No. 8, the altered citation, as not being at issue in this case, as well as never having been served on the operator. I sustained that objection and Government Exhibit No. 8 was now excluded from the record of trial.

Counsel for the Secretary thereupon marked a copy of the citation that was attached to the Notice of Contest as Government Exhibit No. 11 and offered it into evidence through Inspector Card. However, upon voir dire, Inspector Card was unable to decide which document, Exhibit No. 8 or No. 11 was actually the one he wrote the operator on May 16, 1988. Upon objection for lack of foundation for the exhibit, I excluded it from evidence as well.

The upshot of the whole episode was that unable to get either version of the citation into evidence with the witnesses present and available to lay an acceptable evidentiary foundation, the Secretary rested her case.

Whereupon, on motion, I granted the operator's contest and vacated Citation No. 2965807 in all its versions, and closed the hearing. Pursuant to 29 C.F.R. § 2700.65, this decision announced orally from the bench is hereby reduced to a writing and ordered executed this date. Therefore, MSHA's petition for assessment of a civil penalty is dismissed.

Roy J. Maurer
Administrative Law Judge

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OCT 17 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 88-220
	:	A.C. No. 36-05466-03644
v.	:	
	:	Docket No. PENN 88-221
CYPRUS EMERALD RESOURCES, CORPORATION, Respondent	:	A.C. No. 36-05466-03645
	:	Emerald Mine No. 1

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Cyprus Emerald Resources, Corporation (Emerald) with three violations of regulatory standards. The general issues before me are whether Emerald violated the cited regulatory standards and, if so, whether those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial". If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Docket No. PENN 88-220

Citation No. 241935 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 75.1400-3 and charges as follows:

> An adequate daily examination of the elevator located at No. 1 portal is not and cannot be performed due to the excessive amounts of dirt and

grease on the ropes. Also the termination of the governor rope has not been performed properly. The governor rope has been bent through the termination socket on the down side and bent above in the arm above the socket.1/

The cited standard provides in relevant part as follows:

Hoists and elevators shall be examined daily and such examinations shall include, but not be limited to, the following: (a) elevators. A visual examination of the rope for wear, broken wires, and corrosion, especially at excessive strain points such as near the attachments and near where the rope rests on the sheaves...

MSHA Inspector James Bandish, found on January 21, 1988, that the seven 3/4 inch wire ropes to the elevator at the No. 1 portal of the No. 1 mine were covered with excessive dirt and grease. He was therefore unable to perform a proper inspection for possible breaks in the rope valleys. Bandish opined that about 1/2 to 3/4 of the 600 foot-long ropes were in that condition. He later testified that the rope crowns were also obscured by grease and dirt therefore also preventing proper examination for crown wear. According to Bandish such conditions would have taken "weeks and weeks" to develop.

The log books for the daily elevator examinations in fact had handwritten entries showing that examinations were being performed but the entries did not reflect any evidence of grease and dirt on the ropes. While Bandish conceded that he too was unable to perform a proper examination of the wire ropes because of the dirt and grease he nevertheless permitted the elevator to return to service without the ropes being cleaned. He also acknowledged that the system had an 8 to 1 safety ratio thereby indicating that 1 rope would be sufficient to hold the elevator. He was not however concerned with cable breakage but of excess slippage of the ropes around the traction drum that drives the elevator car. This drum depends on friction for grip and according to Bandish, excess grease could result in the elevator sliding back into the pit from a height of 25 to 30 feet. It could then hit the buffers and "knock people over" in the elevator resulting in lost workdays or disabling injuries.

1/ In a bench conference counsel for the Secretary explained that the last two sentences of the citation did not charge a separate violation and accordingly may be considered as surplusage for purposes of these proceedings.

Respondent's witnesses, General Maintenance Foreman Terry Coss and Elevator Examiner, Scott Kramer, both had inspected the wire ropes at issue--Coss at the same time as Inspector Bandish and Kramer two days earlier--and both admitted there was some dirt and grease in the valleys of the ropes. Coss specifically denied however that the crowns were dirty or greasy. Coss also felt that an adequate examination could be performed in any event because broken wires would "ordinarily" protrude through the grease and dirt. Kramer thought that grease and dirt in the valleys would not "ordinarily" cover a defect because a break would protrude outward and excess wear would appear on the crowns which, according to Kramer, were plainly visible.

Within the framework of the undisputed evidence I find that there was indeed dirt and grease in significant areas of the valleys of the cited wire ropes. In addition, I find that such grease and dirt could very well obscure examination of defects in the valleys such as small breaks and corrosion. Inspector Bandish clearly was of this view. Even Respondent's own elevator inspector could state only that such grease and dirt would not "ordinarily" obscure rope defects. In any event, it may reasonably be inferred that dirt and grease in the valleys of the wire ropes would obstruct visual examination of such defects as corrosion.

Since it is also undisputed that the grease and dirt had taken "weeks and weeks" to develop it may also reasonably be inferred that the requisite daily examinations of the ropes could not properly have been made. The violation is accordingly proven as charged. However, in light of the evidence that Inspector Bandish allowed the elevator to return to service without requiring cleaning or further inspection of the ropes, I cannot find that the violation was either "significant and substantial" or serious. See Mathies Coal Co., 6 FMSHRC 1 (1984). Clearly if the violation presented a serious and "significant and substantial" hazard the inspector would not have allowed it to return to service.

In addition, since Emerald itself had ceased operation of the elevator some two days before the MSHA inspection, and was prepared to keep the elevator out of service until new wire ropes arrived, I find Emerald chargeable with but little negligence. Since it is also apparent that the inspector himself did not believe there was a serious hazard (because he allowed the elevator to return to service without cleaning or further inspection of the ropes) it would be difficult to

conclude that the operator should have been aware of any serious hazard.

Citation No. 2938166 alleges a "significant and substantial" violation of the mine operator's ventilation plan under the regulatory standard at 30 C.F.R. § 75.316, and charges as follows:

> The approved ventilation plan was not being complied with in the 16 right (007) section in that a hole measuring 7 inches x 15 inches was present in a stopping between the No. 1 return entry and the No. 2 intake entry at the No. 32 crosscut. The approved plan requires permanent stoppings to be maintained between the intake and return air courses.

In particular the Secretary maintains that the following provisions of the operator's ventilation plan (Government Exhibit 5) were violated:

> Location of all stoppings, overcasts, regulators, seals, airlock doors and man doors are shown on the mine map. At this time, man doors in permanent stopping lines are projected at 450' - 650', or greater intervals at management's discretion. These permanent ventilation controls shall be constructed of solid, substantial materials. List of materials used in constructing the following:
>
> > Permanent stopping (between intake and return): cinder, concrete Omega Block 384 or limestone blocks, mortar, stopping sealant, micon krush bloc, metal and steel doors. Airlock doors constructed either "plywood or 1" x 6", lumber, also several are constructed out of steel. Overcasts, undercasts: cinder, concrete, Omega Block 384, limestone block, mortar, stopping sealant, micon krush bloc, metal, and complete metal overcast (galvanized steel sheeting.) Section intake regulators require approval prior to their installation. Section return regulators and temporary section intake regulators will be constructed the same as permanent stoppings with metal frame adjustable doors. Shaft partitions: concrete steel.

> Permanent stoppings shall be erected between the intake and return air courses and shall be maintained to and including the third connecting crosscut outby the faces of entries except for Exhibit EMMV-15.

Emerald does not deny that the hole, approximately 7 inches by 15 inches in size, did exist in the stopping at the No. 32 crosscut and admits the violation as charged. Emerald argues however that the violation did not involve any "discrete safety hazard" and accordingly that it was not "significant and substantial". I agree. It is undisputed that the hole in the stopping had been used to ventilate a charging station at that location as recently as the previous Friday, January 8, 1988, and that the hole was permissible at that time when used in that fashion. It is also undisputed that on the Friday before the violation the charging station had been moved several blocks away but the subject hole had not yet been patched as of the following Monday when the condition was cited.

The Secretary admits that it would be permissible to maintain two such holes in the stoppings to ventilate two separate charging stations and, in that case, the same amount of air would leak from the intake into the return air course as was caused by the instant violation. It is also acknowledged that the stopping was structurally sound and there were no sources of ignition in the cited crosscut. No air readings were taken at the hole so the amount of leakage could not be determined. Moreover according to the undisputed testimony of Construction Foreman Albert Giacondi, the small amount of leakage had no affect upon the face ventilation.

Accordingly I find that the violation involved little hazard and was not "significant and substantial". See Mathies Coal Company, supra. I agree however with the inspector's assessment that the operator is chargeable with moderate negligence. The undisputed testimony of General Mine Foreman Steve Medve was that at the time of the violation the practice at the mine was to patch such holes within a "reasonable" time as the masons made their rounds for repairs. According to Medve the company now pays "much closer attention to patching holes".

In assessing civil penalties for the above citations I have also considered evidence of the history of violations at Emerald, the size of its business, and its abatement efforts. Under the circumstances penalties of $75 for each of these citations is appropriate.

Docket No. PENN 88-221

Order No. 3086725, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mine operator's roof control plan under the regulatory standard at 30 C.F.R. § 75.200 and charges as follows:

> The approved roof control plan was not being complied with in that two rows of breaker posts were not set inby the cut being mined for the construction of the overcast in the Two East Section at No. 20 crosscut into the intersection of the belt entry. Two rows of posts were not set at 20 crosscut at the track entry where the mining had been in progress at an earlier time. The entrance inby, and outby the No. 20 cross track entry was not provided with a physical barrier to keep people out of the area.

The parties agree that the relevant roof control plan (Government Exhibit No. 3) permits either one of two methods for protecting miners during the process of cutting overcasts or boom holes in a previously supported area. One method, and the method admittedly not followed here, is set forth in the roof control plan as follows: "(1) two rows of posts shall be installed at each approach of the roof area to be removed except the approach where the machine will start cutting". The alternative method is stated in the plan as follows:

> 5) Note: Two roof trusses may be utilized as additional roof support in place of the two rows of posts as stated in item No. 1. The first roof truss installed in the approach shall be located approximately four feet from the roof strata to be mined and the second roof truss shall be installed approximately three feet from the first. In addition, the unused approaches to the overcast or boom hole shall be fenced off with adequate physical barriers to prevent persons from inadvertently entering the area before the mined-out area has been permanently supported.

In this case Emerald had provided "superbolting" to comply with the requirement in this part of the plan for two roof trusses. At issue is whether it was also necessary for Emerald to then have in place "adequate physical barriers to prevent persons from inadvertently entering the area before the mined out area has been permanently supported." Emerald

argues that it was not necessary because the mined-out area had already been permanently supported.

At the conclusion of the Secretary's case-in-chief Emerald filed a Motion for Directed Verdict and Motion for Summary Decision. The Motion for Directed Verdict (See FED.R.CIV.P.41(b) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b) was granted at hearing and that decision appears as follows with only non-substantive corrections:

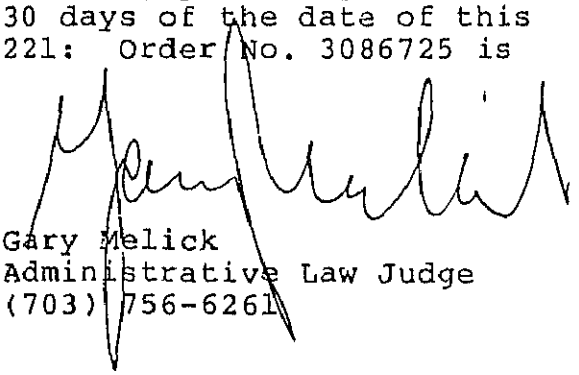
> Judge Melick: I am going to grant the motion. First of all, we have the allegation of violation as clarified and amended -- let me refer to that momentarily. The allegation as it stands before me now is an alternative pleading, as I understand it, that in order to comply with this Roof Control Plan (that's Government Exhibit No. 3) you must comply either with Provision 1, which states, "Two rows of posts shall be installed at each approach of the roof area to be removed except the approach where the machine will start cutting," or comply with Provision 5, which requires roof trusses or as it is acknowledged, in the alternative, superbolting, plus, in addition to the superbolts, a requirement which is stated in these words, "In addition, the unused approaches to the overcast or boom hole shall be fenced off with adequate physical barriers to prevent persons from inadvertently entering the area before the mined-out area has been permanently supported." It is conceded and acknowledged that Provision 1 was not met in this case, that is that the two rows of posts were not installed. However, it is alleged and maintained by the Operator that it complied with Provision 5, in essence, that it did have superbolting but that it was not required yet to have the physical barriers present because the mined-out area was, indeed, permanently supported. I agree with that statement.
>
> The evidence shows, and this is from the mine inspector himself, that the mined out areas, specifically those areas shown on Joint Exhibit No. 1 with shading, were permanently supported. The evidence also shows that the area in the No. 20 crosscut between the shaded areas still had roof bolts in it from the regular mining process. Those roof bolts had not been removed and no cutting or mining had commenced in that portion of the No. 20 crosscut. Now, I am limiting my decision to the

facts of this case and to the precise wording of the Roof Control Plan. It appears that there may have been a very serious hazard here but unfortunately I don't see where the Roof Control Plan addresses the hazard that the inspector testified about. It so often happens when a Roof Control Plan is drawn up, it is not drawn with the precision or with the ability to foresee all possible hazards and, unfortunately, I think that is the case here. I think you are going to have to do some work on that Roof Control Plan to tighten it up to include the hazard that the inspector related -- and I have no doubt that what he has testified about does constitute a hazard.

The problem is the Mine Safety Act and due process standards require you to give advance notice to the mine operator as to precisely what that hazard is and I don't believe this Roof Control Plan does that. So, under the circumstances, I am going to grant the motion for a directed verdict as the evidence stands and vacate that order.

ORDER

Docket No. PENN 88-220: Citations No. 2938166 and 2941935 are modified to non "significant and substantial" citations and are affirmed as modified. Cyprus Emerald Resources Corporation is directed to pay civil penalties of $75 for each violation within 30 days of the date of this decision. Docket No. PENN 88-221: Order No. 3086725 is vacated.



Gary Melick
Administrative Law Judge
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OCT 17 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 88-36 A.C. No. 15-16037-03501
v.	:	Docket No. KENT 88-79 A.C. No. 15-16037-03502
BLACK BEAUTY COAL COMPANY, Respondent	:	No. 1 Mine

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Petitioner;
Ms. Maxine Patterson, and Mr. Owen Grubb, Black Beauty, Middlesboro, KY, for the Respondent.

Before: Judge Fauver

These consolidated proceedings were brought by the Secretary of Labor under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Secretary seeks civil penalties for alleged violations of safety standards.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all times relevant, Respondent, a small operator, operated a surface coal mine, known as Mine No. 1, in Knox County, Kentucky. The mine produced coal for regular sales or use in or substantially affecting interstate commerce.

2. Citation 2794718 was issued on May 20, 1987, by Inspector Alex Sorke for a violation of 30 C.F.R. § 77.1001. Loose, hazardous material had not been stripped from the top of the mine pit and the mine highwall. The mine highwall at the site was 40 to 50 feet high and 50 to 60 feet long. There were overhanging trees, as well as loose dirt and rocks throughout the length of the wall.

3. Citation 2794719 was issued on May 20, 1987, by Inspector Sorke for a violation of 30 C.F.R. § 77.403. A front-end loader was in operation beneath the highwall. The cab on the front-end loader had been removed, and therefore the equipment had no falling object protection.

4. Citation 2794721 was issued on May 20, 1987, by Inspector Sorke for a violation of 30 C.F.R. § 48.25. Miners were employed on the mine site without having had the training required for new miners.

5. Order 2794722 was issued on May 20, 1987, by Inspector Sorke for a violation of 30 C.F.R. § 77.410. A Caterpillar bulldozer was not equipped with a backup alarm.

6. Order 2794717 was issued by Inspector Sorke on May 20, 1987, under § 107(a) of the Act, closing the entire pit because of an imminent danger. The imminent danger resulted from the dangerous highwall in conjunction with the operation of mobile equipment near the highwall without falling object protection. This order was not terminated until May 29, 1987.

7. Citation 2794724 was issued on May 27, 1987, by Inspector Sorke for operating the mine contrary to the above closure order (No. 2794717). The mine site was in operation May 27, 1987, while the order was in force. The front-end loader, which lacked falling objection protection, had previously been removed from the pit on May 20, 1987, pursuant to a § 107(a) order, but had been returned to the pit. Piles of coal were present and ready for loading. Coal trucks were lined up to be loaded.

8. Citation 2794725 was issued on May 27, 1987, by Inspector Sorke for operating a Caterpillar bulldozer in violation of a closure order (No. 2794722). The order, written under § 104(d)(1) of the Act on May 20, 1987, had removed the bulldozer from service for failure to have a backup alarm.

DISCUSSION WITH FURTHER FINDINGS

With the exception of Citation 2794725, discussed below, I credit the inspector's testimony and notes as to the conditions he observed when the above citations and order were issued. The credible evidence also warrants the conclusions reached by the the inspector as to gravity, negligence, and violations and his allegations as to such matters in the citations and order (except Citation 2794725) are incorporated in this Decision as conclusions.

Regarding Citation 2794725, the inspector testified that he heard an engine which he assumed to be the bulldozer that was the subject of the backup alarm order and listened for a backup alarm but heard none. However, he could not see the vehicle at that time. Later he saw the bulldozer standing still, and walked past the bulldozer, but did not inspect it to see whether it had a backup alarm. I find that the evidence does not meet the Secretary's burden of proving the violation as charged.

Considering the criteria for civil penalties in § 110(i) of the Act, I find that the following civil penalties are appropriate for the violations found herein:

Citation or Order	Civil Penalty
Citation 2794718	$700
Citation 2794719	700
Citation 2794721	800
Order 2794722	500
Citation 2794724	950
	$3,650

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over these proceedings.

2. Respondent violated the safety standards as alleged in the above citations and order, except Citation 2794725.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay the above civil penalties of $3,650 within 30 days of this Decision.

2. The charge alleged in Citation 2794725 is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 20 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 88-17-M
	:	A.C. No. 41-03197-05506
v.	:	
	:	Porter Plant & Pit
HALLETT CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Frank Johnson, Division Manager, Hallett Materials, Porter, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks civil penalty assessments in the amount of $595 for six alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in Houston, Texas. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record in the course of the hearing.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalty to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violations were

"significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

All of the contested citations in this case were issued by MSHA Inspector Melvin R. Jacobson during the course of an inspection of the respondent's sand and gravel dredge operation on August 19, 1987 (Tr. 8). The inspector was accompanied by respondent's mine foreman, Steve Iverson (Tr. 11).

Section 104(a) "S&S" Citation No. 3061118, cites a violation of mandatory safety standard 30 C.F.R. § 56.12025, and the condition or practice is described as follows: "The ground lug on the electrical cord for the fan used on the left walkway of the dredge was broke off exposing personnel to a probable shock hazard should a fault occur on the fan motor or controls."

Inspector Jacobson testified that he issued the citation after finding the ground lug of an electrical plug-in cord of a 110-volt, 1/2 horsepower, metal encased cooling fan broken off. The fan was one of two fans located on either side of the dredge, and he believed they were used for cooling the cabin. He observed an electrical outlet nearby, and the cord was long enough to reach it. The fan was portable, had no handles, and the fan blade was 18 to 24 inches in diameter. The cited fan was not plugged in, and neither fan was operating. The dredge was down for maintenance, and no one was at the controls. Mr. Jacobson stated that he pointed out the condition to Mr. Iverson, and he agreed that it was a hazard and stated that he would take care of it "right away" (Tr. 12-14).

Mr. Jacobson believed that the lack of a ground lug constituted a hazard because under a fault condition, the fan could be energized and someone could be severely shocked. If this occurred, the individual could suffer fatal injuries or burns. Since the dredge operator is sometimes alone on the dredge, if he were to receive a shock, no one would be there

to help him. No one can predict when a fault will occur, and any deterioration of the insulation on the wiring could result in a fault if it were to contact the metallic fan parts. The lack of a sufficient grounding device would not blow the fuses, and if anyone were to touch the fan with the current still on, they could become part of the circuit and this could result in a fatal shock. Mr. Jacobson believed that it was reasonably likely that an injury would occur "based on the fact that these type accidents have been and are continuing to occur" (Tr. 16). He stated that one of his friends was fatally injured after using an electrical cord without a ground lug on it (Tr. 20).

Mr. Jacobson confirmed that he made a finding of "low negligence" because the dredge operator probably was not cognizant of the potential shock hazard, and the fact that the foreman was new and probably did not recognize the potential for an accident. The violation was abated by installing a proper plug with a connecting ground to provide the proper protection to prevent a fault in the current on the fan frame (Tr. 17).

Mr. Jacobson believed that the fan was not new and had been used for a long period of time, and exposure to the sunlight would contribute to the deterioration of the wiring. He confirmed that he observed no deterioration, but did observe that it had been exposed to a certain amount of grease and oil which would also add to the deterioration of the cord (Tr. 19). He confirmed that he inspected the cord receptacle and found that it would accommodate a three-conductor plug (Tr. 20).

Section 104(a) "S&S" Citation No. 3061120, cites a violation of 30 C.F.R. § 56.12025, and the condition or practice is described as follows:

> The ground lug on the cord plug-in for the battery charger in the shop was broke off. Additionally, 3 Light extension cords in the gravel plant and 1 in the sand plant had the ground lugs broke off. The foreman cut the plugs off these cords. This citation will only be abated when all of the cords are removed from service or new 3 conductor plug-ins installed.

Inspector Jacobson confirmed that this citation was similar to the previous one in that he found electrical extension cords with the ground lugs cut off in the locations noted.

The battery charger in question was often used with extension cords to reach the batteries being charged on equipment located at the mine. He observed the battery charger at the shop area near a trailer used as a maintenance area. A grounding lug is necessary because a battery charger is an electrical device that changes AC current to DC current through a rectifier, and a fault on the charger could energize the metal charger case, as well as the vehicle to which it is attached. Anyone coming in contact with the current, or between the two potentials, could be killed. The remaining plugs were not being used and were rolled up and stored in the trailers, but they were available for use by the employees. The battery charger was not being used, and if it were, he would have taken it out of service. Mr. Iverson agreed that the conditions posed a severe hazard and indicated that he "was going to keep better track of his equipment from now on," and was concerned about it (Tr. 23).

Mr. Jacobson stated that a failure of the insulation or any of the component parts of the metal battery charger under a fault condition would cause the metal surface of the battery charger to become charged, and without a ground to blow the fuse, anyone could put their hand on it and become part of the circuit. The same would be true if the frame of a vehicle being charged were touched, and "it don't take much current to take you out" (Tr. 24).

Mr. Jacobson believed that the cited conditions posed a serious hazard, and that an electrical accident would likely result in fatal injuries or burns. He stated that "the battery charger, in particular, is notorious for causing accidents" (Tr. 25). If the battery charger had been plugged in, Mr. Jacobson would have removed it from service by issuing an imminent danger order because fault conditions can occur at any time (Tr. 26). The cords which were stored "weren't in bad shape, except that the plug ends were broke off," and Mr. Jacobson believed that they were relatively new cords (Tr. 27). Mr. Jacobson observed no visible signs of deterioration in any of the cords, including the one used on the battery charger, and if the ground lug were in place, he would have had no other reason for citing it (Tr. 28).

Mr. Jacobson confirmed that he based his "moderate negligence" finding on the fact that the individuals using the equipment are maintenance personnel, and that the supervisor was new and not aware of his responsibility to see to it that the equipment is maintained properly (Tr. 29). Mr. Jacobson stated that during a previous inspection in February, 1987, he found some extension cords with the ground plugs broken off in storage and

discussed the matter with Mr. Johnson. Mr. Jacobson believed that these cords were either destroyed or replaced by new ones. He did not cite the prior cords because "I would probably have had a problem proving they were being used," and he did not cite the battery charger previously because it had a ground plug on it (Tr. 32). The cited fan had never been a problem in the past, and Mr. Jacobson confirmed that his inspection of August 19, 1987, was the first time he ever noticed any problem with electrical equipment on the dredge (Tr. 32).

Section 104(a)"S&S" Citation No. 3061127, cites a violation of 30 C.F.R. § 56.14001, and the condition or practice is described as follows: "The drive coupling on the fresh water pump on the pond supplying water to the plant was not guarded."

Mr. Jacobson confirmed that he issued the citation after finding an unguarded water pump drive coupling on the pump being used to pump water to the plant area. The coupling was a moving metallic machine part, and he identified exhibit P-3 as a photograph taken of the pump, coupling, and motor, and confirmed that the coupling is used to connect the pump to the motor (Tr. 34-36).

Mr. Jacobson believed that anyone coming in contact with the coupler could be injured, and he investigated one case in which an individual's coattail was caught in a similar coupling, and it resulted in fatal injuries. He believed that anyone contacting the coupler could suffer severe lacerations, bruises or burns, "something that would cause him to lose time." He described the motor as a 100 to 150 horsepower motor, and estimated that the coupler would turn at least at 120 rpm (Tr. 37). He believed that anyone greasing the pump while it was operating, or observing a mechanical problem, could contact the coupler inadvertently or brush against it. If it were cold weather, a jacket tail could wrap around the shaft and access to the pump was by means of a walkway or ramp from the shore to the pump location (Tr. 38).

Mr. Jacobson stated that the coupler has two parts which are coupled together by bolts which leave seams, and that it probably has rough edges. He confirmed that the pump could be turned on and off from shore, and that no one needs to board the barge where the pump was located to start and stop it. The only reason one would have to go on to the barge would be for maintenance of the coupling or to grease the pump. Mr. Jacobson had no knowledge of the respondent's maintenance procedures, but he believed that the pump should be greased once a day and that the ideal method for greasing the pump

bearings would be while it was running. However, he did not know whether the pump in question was greased while it was running or while it was turned off (Tr. 41).

Mr. Jacobson believed that it was reasonably likely that an accident would occur if someone on the barge came in contact with the drive coupling in question, and that he could brush against it with his leg and tear the tissue. He stated that one cannot predict when someone will walk out to the barge, but the opportunity is there, and the hazard exposure has "accident probability," and the coupler needed to be protected (Tr. 44).

Mr. Jacobson confirmed that he made a finding of "low negligence" because the respondent did not believe the coupling had to be guarded because the pump could be started and stopped without anyone going on the barge. Abatement was achieved by guarding the coupler (Tr. 45).

Section 104(a) "S&S" Citation No. 3061128, cites a violation of 30 C.F.R. § 56.14006, and the condition or practice is described as follows: "The sides of the guard on the pea gravel conveyor had been removed, exposing the pinch point."

Inspector Jacobson stated that he had previously observed the conveyor in question during a prior inspection in February, 1987, and it was guarded. He identified exhibit P-4 as a photograph of the tail pulley area of the conveyor, and he confirmed that during his inspection of August 19, 1987, the guards had been removed from the side, exposing the pinch points and moving parts of the pulley. The guard on the back side of the self-cleaning tail pulley was intact and not removed, and he described it as the wire mesh guarding shown in the photograph. He also described the location of the unguarded pinch point (Tr. 44-48).

Mr. Jacobson confirmed that the conveyor was not in use at the time of his inspection, but that Mr. Iverson admitted that it had been used without the guard in place, and the presence of small particles of material on the frame of the conveyor, as shown in the photograph, would indicate that the conveyor was operated without the guard in place (Tr. 49). Mr. Jacobson believed that anyone working around the open pinch point while greasing the tail pulley or cleaning up around it would be exposed to the moving parts. He was aware of injuries occurring under other similar conditions, and injuries have happened through inadvertence or thoughtless acts while working in such areas. The conveyor was out in the open, and anyone walking by could stick his hand into the

pinch point if he were to fall or slip. Anyone walking on the outside of the conveyor, however, would have to stick his arm into the pinch point. The conveyor operates at high speed, and the pulley is turning at a rapid rate. If one were to contact the pinch point he could not react fast enough to get away from it, and many individuals have been known to get caught in similar situations (Tr. 51-53).

Mr. Jacobson stated that Mr. Iverson offered no explanation as to why the guard was off, and Mr. Jacobson saw no guard in the area. A new guard was made and installed to abate the violation, and the respondent did a good job in designing and installing a guard which was much better than those on the other conveyors in the area. Mr. Jacobson stated that he had no information that the guard had been removed for changing bearings, and was replaced before the plant was started up. Had he been told that the conveyor was out of service and locked out, which he doubted was the case, he would not have issued the citation (Tr. 53-55).

Mr. Jacobson believed that it was reasonably likely that an accident would occur as the result of the unguarded conveyor in question because unguarded equipment of this type has caused numerous serious and fatal accidents over the years, and he confirmed that within the past 6 months he investigated an accident where an individual lost an arm in an unguarded pulley pinch point (Tr. 58). Mr. Jacobson believed that all guarding citations are "S&S" because "at some point in time, around a piece of unguarded equipment that is accessible, somebody is going to have to go there," and no one can predict when this will occur (Tr. 59-60). Inadvertent accidents and mistakes have caused many injuries of this type in the past (Tr. 61). He made a finding of "moderate negligence" because the supervisor was new, and Mr. Johnson was not able to be present at the mine site for some time (Tr. 61-62).

Section 104(a) "S&S" Citation No. 3061129, cites a violation of 30 C.F.R. § 56.12032, and the condition or practice is described as follows: "A motor starter box in the gravel plant electrical panel had the cover off exposing the electrical 480-volt conductors."

On September 2, 1987, the inspector terminated the citation, modified it to a non-"S&S" citation, and also modified the gravity finding to "unlikely." The reasons for these modifications are stated as follows: "It was determined the box was disconnected lowering the degree of hazard to unlikely, no lost work days, non-S&S. The cover should have

been on the box to protect the magnetic starter from mechanical damage. The cover was placed on the box."

Mr. Jacobson explained the circumstances which prompted him to issue the citation. He stated that he observed a cover off of a motor starter box, and the motor starter was attached by conduit to a fuse box directly above it. He assumed the unit was either used, or could be used, and if someone "threw the right switch, they could turn the power on," exposing the uncovered electrical parts inside the box and thereby presenting a hazard if someone contacted the parts. Since the area was muddy, a person walking through the area could slip or fall and easily come in contact with the exposed electrical parts. He believed the box needed to be protected or removed if it were not to be used (Tr. 63-64).

Mr. Jacobson stated that during his follow-up abatement inspection it was brought to his attention that the wiring inside the cited starter box had been removed, and at the time of his spot inspection "there was evidence that this was the case." However, since the starter motor was still there, Mr. Jacobson believed that it was going to be used again, and that it needed to be protected and maintained in an operable condition. He conceded that the starter could only be used only if the box were re-wired, and that under the prevailing conditions, the motor could not have been started. Under the circumstances, the only hazard presented "would be in the abuse of the equipment." He assumed that if the starter box were to be used again, there was an opportunity to use the old box which had been exposed to mud and water. He could not recall observing any wires going into the box during his initial inspection, and during his follow-up, there were no wires in the box, and it was deenergized. He also stated that during his initial inspection, he assumed the box "was dead," but that it could be energized. At that time, the plant was down, and the power to the starters was off (Tr. 66-68). He assumed that the conduit connecting the fuse box to the starter box would allow current to flow, but that the upper portion of the box had apparently been disconnected (Tr. 69).

Mr. Jacobson confirmed that he made a gravity finding of "reasonable likely" based on the information he had during his initial inspection, but that he would now rate it "unlikely." He believed that the respondent's negligence was "low," and assuming the box had been wired, he would have required the cover to be replaced with a screw to hold it on. Assuming the box were not wired or "live" he would require the box to be covered to protect the components, and in this case abatement was achieved by installing a cover over the box. The box was

subsequently removed, and he believed this was a good idea (Tr. 69-70).

On cross-examination, Inspector Jacobson confirmed that he was unaware that the cited fan was burned out, and that Mr. Iverson informed him that it was in operable condition. Mr. Jacobson stated further that both he and Mr. Iverson believed that the fan would have worked if it were plugged in, and that the fact that it may have been burned out made no difference. He believed that a burned out fan presented every opportunity for a shock hazard because a fan motor malfunction could energize the frame of the fan if it were plugged in (Tr. 80-81).

With regard to the cited electrical extension cords, Mr. Jacobson confirmed that during his prior inspection he discussed with Mr. Johnson the fact that ground lugs were missing from extension cords which were not in use and stored in a parts trailer. Although Mr. Jacobson did not cite them at that time, he included them in the citation which he issued during the August 18, inspection because they were available for use on the battery charger. The batter charger cord was not long enough to reach a piece of machinery in the shop area, and Mr. Jacobson believed that the cords would have been used to reach the equipment being charged with the battery charger (Tr. 85).

In response to further questions, Mr. Jacobson stated that an extension cord carries current to the circuit, and it is an extension and integral part of the circuit. Without a grounding lug or conductor, there is no grounding continuity. As soon as an extension cord is plugged in, it becomes part of the circuit (Tr. 86-87). Mr. Jacobson confirmed that he has observed battery chargers used with more than one extension cord at other mining operations, but not at the respondent's mine. He cited the cords because he believed they would be used in series with the battery charger, and to bring to the attention of the respondent the fact that the cords had a problem that needed to be corrected (Tr. 89).

Mr. Jacobson stated that there is no MSHA standard specifically requiring an extension cord to have a ground lug, and if he were to cite only an extension cord he would cite section 56.12030 which requires the correction of a potentially dangerous condition before equipment or wiring is energized. He confirmed that the cords were not in use, but in storage, and that he had previously discussed the lack of ground lugs with Mr. Johnson and that "it is quite apparent that conversation wasn't doing the job" (Tr. 92).

Mr. Jacobson stated that the battery charger was portable and mounted on small wheels, and that it was used to charge batteries on mobile equipment, including trucks and pick-ups. The battery charger cord was not long enough to reach out to the trucks without the use of an extension cord, and the battery charger was on the ground in the shop area. If the charger were taken to the vehicle, an extension cord would be required because the charger would have to be plugged into an electrical source. Although a battery could be removed from a piece of equipment and taken to the charger, he found this highly unlikely because the batteries are large and heavy (Tr. 93-96).

Respondent's Testimony and Evidence

Division Manager Frank Johnson asserted that the cited fan was burned out and was not in use at the time of the inspection. He explained that the fan was not removed from the dredge because it weighed 40 pounds and would require two men to carry it and place it in a boat to take it to shore. He conceded that the fan was not tagged out, and had no knowledge as to whether Inspector Jacobson was aware of the fact that the fan was inoperable (Tr. 82-83; 96-97).

With regard to the cited electrical extension cords, Mr. Johnson stated that they were not in use and that "we threw them in the parts trailer to get them out of service" (Tr. 97). He confirmed that as a result of Mr. Jacobson's prior inspection in February, "we had gotten rid of all the old, ungrounded cords, and bought new ones." Mr. Johnson conceded that the battery charger ground lug was broken off, and he explained that some of his employees who live nearby probably used the charger to charge their personal batteries and broke the lug off because their house had no grounding plug-in device, and "they probably snapped it off" (Tr. 98).

With regard to the cited unguarded coupler, Mr. Johnson stated that it is perfectly round with no protrusions on it, and that it is powered by a 75 horsepower motor, and turned at 1750 rpms. Mr. Johnson explained that the pump is greased in the morning before it is started, and the water valves are opened to bleed off any air. As soon as the flow of water begins, the valve is closed, and the pump is started from shore with a start button, and "we never touch it again until the next morning." No one is on the barge during the course of the day, unless something breaks down. Any breakdown would only involve the pump or motor because they are the only

moving parts on the barge, and in the event maintenance is required this equipment is shut off (Tr. 99).

Mr. Johnson stated that if anyone contacted the coupler while it was in operation and spinning, he could suffer bruised or broken ribs, but not fatal injuries, and this would also be true if anyone fell against the guard which was installed to abate the violation. He believed that the likelihood of anyone coming in contact with the coupler while it was in operation was remote (Tr. 99-101).

With regard to the unguarded conveyor, Mr. Johnson stated that the rock plant was down at the time of the inspection, and that the conveyor belt speed was approximately 70 feet per minute (Tr. 102). Mr. Johnson could not confirm that Mr. Iverson told Mr. Jacobson that the belt had operated with the guard off, and he stated that Mr. Iverson "was a very shook up man because he got nailed with 19 citations that day," and he has since quit (Tr. 102-103). Mr. Johnson agreed that if Mr. Iverson told the inspector the conveyor was operated without a guard, "he should give him a citation" (Tr. 109).

With respect to the cited starter box with the missing cover, Mr. Johnson stated that the box was not in use and that all of the wires had been torn out of it when several conveyors were dismantled and removed, and the disconnected box simply remained in the panel (Tr. 109). The box in question had been used for a magnetic starter, and the stop-start switch was located on a separate panel and had a cover on it (Tr. 110). Mr. Johnson agreed that in the event the box in question had been hooked up, it would have been dangerous (Tr. 111). Mr. Iverson may not have been aware of the fact that the wires had been removed from the box because he was not working there when the prior dismantling work was done, and Mr. Jacobson may not have known it because he was not the inspector when this work was done (Tr. 112).

Findings and Conclusions

Fact of Violations

Citation No. 306118 - 30 C.F.R. § 56.12025

The credible evidence of record reflects that the cited electrical fan cord used to supply power to the fan had its grounding lug broken off, thereby rendering it incapable of providing any ground continuity in the event the fan were plugged into a receptacle which was within ready access of the

fan. The cited standard section 56.12025, requires that all metal enclosing or encasing electrical circuits be grounded or provided with equivalent protection. While it is true that the fan was not plugged into the receptacle when the inspector observed it, thus completing the circuit between the fan and the electrical source provided by the receptacle, the fact is that the electrical circuitry inside the fan motor, which was enclosed with a metallic frame or covering, was not provided with any workable grounding device since the ground lug to the power cord had been broken off. Under the circumstances, I conclude and find that the cited fan was not provided with any grounding protection, nor was it provided with any equivalent ground protection. Accordingly, I conclude and find that the petitioner has established a violation of the cited standard, and the citation IS AFFIRMED.

Citation No. 3061120 - 30 C.F.R. § 56.12025

The respondent has conceded that the ground lug on the electrical plug-in cord which supplied power to the cited battery charger was broken off, and the credible testimony of Inspector Jacobson establishes this fact. Given the fact that the broken grounding lug would not provide a means of maintaining any grounding continuity or protection for the metallic battery charger circuitry, and the fact that no equivalent grounding protection was provided, I conclude and find that the petitioner has established a violation of the cited standard, and the citation concerning the battery charger IS AFFIRMED.

With regard to the extension cords which were found in the equipment trailer and which were not in use or connected to the battery charger, I cannot conclude that the missing ground lugs, standing alone, constituted a violation of section 56.12025. The cords were not an integral part of the battery charger electrical circuitry, and Inspector Jacobson's speculative opinion that they were available and could be use in conjunction with the battery charger's power cord is insufficient to establish a violation. Further, Mr. Jacobson admitted that part of his reason for citing the cords was to alert the respondent to the fact that the broken ground lugs may present a problem, and he conceded that although MSHA has no specific mandatory standard for citing extension cords per se, he could have cited section 56.12030, which requires that potentially dangerous conditions be corrected before equipment or wiring is energized. Under all of these circumstances, that portion of the citation which alleges a violative condition in connection with the extension cords which were in the trailer IS VACATED.

Citation No. 3061127 - 30 C.F.R. § 56.14001

The respondent does not dispute the fact that the drive coupling for the water pump located on the barge was unguarded, and Inspector Jacobson's credible testimony establishes that this was the case. The cited section 56.14001 requires that all exposed moving machine parts, such as a coupler, which may be contacted by persons and which may cause injury to persons, be guarded. Mr. Johnson conceded that the coupler in question was a moving machine part, and although he believed that the chances of someone contacting the unguarded and exposed coupler were remote, he nonetheless confirmed that someone could have have come in contact with it while it was spinning, and if they did, they could possibly suffer bruised or broken ribs. Under all of these circumstances, I conclude and find that the petitioner has established a violation of the cited standard, and the citation IS AFFIRMED.

Citation No. 3061138 - 30 C.F.R. § 56.14006

The respondent has not rebutted the credible testimony of Inspector Jacobson which establishes that the conveyor side guard in question had been removed and not replaced. Since Mr. Iverson is no longer employed by the respondent, and was not called to testify. Mr. Jacobson's testimony that Mr. Iverson admitted that the conveyor had been in operation without the guard in place, and that the presence of materials on and around the frame of the conveyor led him to believe that the conveyor had been operated without the guard in place, is unrebutted. Further, Mr. Johnson conceded that if Mr. Iverson told the inspector that the conveyor was operated without the guard in place, the citation was justified (Tr. 109).

The cited section 56.14006 requires that guards be securely in place while machinery is being operated. While it is true that the conveyor was not in operation during the inspection, I conclude and find that the evidence presented by the petitioner establishes with some degree of reasonable certainty that the conveyor had in fact been operated with the guard off, and the inspector found no evidence of any guard nearby the cited equipment.

Although the standard provides for an exception for a guard while the equipment is being tested, and the respondent's answer states that bearings were being changed, and that the guard was assembled before the plant was started, the respondent advanced no such credible evidence at the hearing.

Further, the fact that the conveyor was guarded to the rear of the exposed and moving pulley area, suggests that the respondent was aware of the fact that the area was hazardous and needed guarding.

In view of the foregoing, and on the basis of all of the credible evidence adduced by the petitioner in support of the violation, I conclude and find that a violation of section 56.14006, has been established, and the citation IS AFFIRMED.

Citation No. 3061129, 30 C.F.R. § 56.12032

The record reflects that the cited motor starter box which lacked a cover was inoperable and that all of the wiring inside the box had been removed. There was no power to the box, and Inspector Jacobson conceded that the box could only be rendered operable if it were re-wired and again placed in service. Mr. Johnson's unrebutted testimony, which I find credible, establishes that the box had been disconnected and the inside wires removed for a long time prior to the inspection of August 19, 1987, when several conveyors used in conjunction with the box in question were dismantled and removed. Mr. Johnson testified that although the box was in use in 1985, the conveyors were torn out and the box was disconnected and the wires were removed (Tr. 109).

The cited standard, section 56.12032, requires that cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs. I conclude and find that the dismantling and removal of the conveyors and the removal of the wires from inside the box which was used in conjunction with the conveyors when they were operable, constituted repair work. Under the circumstances, I conclude that the removal of the box cover falls within the exception found in the standard, and there is no evidence that the box was ever used or rendered serviceable subsequent to the time this repair work was done. I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

The respondent has withdrawn its contest of section 104(a) "S&S" Citation No. 3061132, August 19, 1987, citing a violation of mandatory safety standard 30 C.F.R. § 56.12032 (Tr. 70-71). Inspector Jacobson issued the citation after finding that a lighting panel at the plant was not provided with an inner cover, thereby exposing a person to a 220-volt single phase hazard when the outer cover was raised to turn on the lights. Under the circumstances, the citation IS AFFIRMED AS ISSUED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Based on the credible testimony of the inspector, I conclude and find that the violation concerning the missing ground lug on the fan electrical cord (3061118), and the violation concerning the missing ground lug on the battery charger electrical cord (3061120), posed a discrete shock hazard within the Commission's interpretation of "significant and substantial." Even though the fan may have been inoperable, it was not removed or tagged out, and in the event someone inadvertently plugged it in and a fault occurred, the metallic fan frame could have been energized. Had this occurred, the individual plugging it in would likely suffer a shock or burn injury of a reasonable serious nature. This same result would occur in the event a fault occurred while someone using the battery charger plugged in the cord supplying power to the charger. The evidence establishes that employees often used the battery charger to service their personal vehicles, and this would increase the likelihood of an injury by the use of the charger without a proper grounding device. Under these circumstances, I conclude and find that these violations were significant and substantial, and the inspector's findings in this regard are affirmed.

With regard to the unguarded motor drive coupler on the fresh water pump (3061127), I agree with the inspector's significant and substantial finding. While it is true that the motor could be turned on and off from shore, the unguarded coupler was readily accessible to anyone on the barge greasing or performing maintenance work. Although respondent's witness Johnson stated that no one had a need to be on the barge while the pump was in operation, he conceded that someone would necessarily be present in the event of an equipment breakdown, and he confirmed that if anyone inadvertently came in contact with the exposed and unguarded coupler, he would likely suffer broken or bruised ribs. Under the circumstances, I conclude and find that the violation was significant and substantial, and the inspector's finding is affirmed.

With regard to the unguarded pea gravel conveyor violation (3061128), the credible testimony of the inspector supports his significant and substantial finding. Although the conveyor was not in operation at the time of the inspection, the evidence presented by the inspector supports a reasonable unrebutted

inference that material had been processed with the conveyor running with an exposed unguarded pinch-point which was readily accessible to anyone greasing or cleaning up in the vicinity of the unguarded conveyor pulley. Since the conveyor operates at a relatively high speed, anyone inadvertently contacting the unguarded pinch-point would likely suffer injuries of a reasonably serious nature. I conclude and find that this violation was significant and substantial, and the inspector's finding is affirmed.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The parties agreed that the respondent is a medium-sized sand and gravel operator (Tr. 121-122), and absent any evidence to the contrary, I conclude and find that the civil penalty assessments which I have made for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Petitioner's counsel did not have a computer print-out of prior assessed violations available at the hearing. However, based on the information available from MSHA's proposed assessment form, petitioner's counsel stated that the respondent was issued 10 prior citations during the 24-month period prior to the issuance of the contested citations in this case. Counsel had no knowledge as to whether or not any of the prior citations were similar to those issued in this case (Tr. 119-120). Given the available evidence, I cannot conclude that the respondent's history of compliance is such as to warrant any additional increases in the civil penalties which have been made for the contested violations in issue in this case.

Good Faith Compliance

The record establishes, and the parties agreed, that all of the violations were timely abated by the respondent in good faith (Tr. 17, 30, 45, 54-62, 122). I have taken this into account with respect to the civil penalty assessments made in this case.

Negligence

The inspector's negligence findings as to each of the citations in question, ranging from low to medium, are affirmed. I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care.

Gravity

For the reasons stated in my significant and substantial violations findings, I conclude and find that the violations concerning the missing ground lugs on the fan and battery extension cords, the unguarded motor drive coupler on the barge water pump, and the unguarded pinch point on the pea gravel conveyor were all serious violations.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed in this proceeding:

Citation No.	Date	30 C.F.R. Section	Assessment
3061118	08/19/87	56.12025	$ 112
3061120	08/19/87	56.12025	$ 100
3061127	08/19/87	56.14001	$ 68
3061128	08/19/87	56.14006	$ 126
3061132	08/19/87	56.12032	$ 112

In view of my findings and conclusions concerning the cited electrical motor box, Citation No. 3061129, 30 C.F.R. § 56.12032, the citation IS VACATED, and the petitioner's proposal for assessment of a civil penalty for this violation is REJECTED AND DISMISSED.

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in this proceeding within thirty (30) days of this decision and order. Upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 20 1988

THE HELEN MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 88-1-R
	:	Order No. 2881028; 8/31/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Homer City Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-112
	:	A.C. No. 36-00926-03705
v.	:	
	:	Homer City Mine
THE HELEN MINING COMPANY, Respondent	:	

DECISION

Appearances: Joseph Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Ronald B. Johnson, Esq., Volk, Frankovitch, Anetakis, Recht, Robertson & Hellestedt, Wheeling, West Virginia, for The Helen Mining Company (Helen).

Before: Judge Broderick

STATEMENT OF THE CASE

Helen contests a withdrawal order issued under section 104(d)(2) of the Act on August 31, 1987, alleging a violation of 30 C.F.R. § 75.503. The Secretary seeks a civil penalty for the violation alleged in the contested order. The two proceedings were ordered consolidated for the purposes of hearing and decision. Pursuant to notice, the consolidated cases were heard in Pittsburgh, Pennsylvania on August 16, 1988. Thomas Whitehair, Ronald Lee Rhodes and William D. Sparvieri testified on behalf of the Secretary. Joseph Lewis Dunn and Wayne Fink testified on behalf of Helen. Both parties were given the opportunity to file posthearing briefs. Counsel for Helen filed a brief; counsel for the Secretary did not. I have considered

the entire record and the contentions of the parties, and make the following decision.

ISSUES

1. The basic issue in this proceeding is a factual one: was the pump switchbox cited on August 31, 1987 - admittedly nonpermissible - in return or intake air? If it was in return air, a violation is established; if in intake air, a violation is not established.

2. If a violation is established, was it significant and substantial?

3. If a violation is established, what is the appropriate penalty?

FINDINGS OF FACT

At all times pertinent to this proceeding, The Helen Mining Company was the owner and operator of an underground coal mine in Indiana County, Pennsylvania, known as the Homer City Mine. Helen produced over three million tons of coal annually, of which 800,000 tons were produced at the subject mine. The record does not contain any evidence respecting Helen's history of previous violations. Therefore, I assume that it had a favorable history. The subject mine is a gassy mine and liberates more than two million cubic feet of methane in a 24 hour period.

On August 31, 1987, Federal mine inspector Wayne Burkey and inspector trainee Thomas Whitehair conducted a regular ("AAA") inspection at the subject mine. They entered the mine with Dale Montgomery, a company safety representative and Ron Rhodes, a union safety committeeman. At one point during the inspection, the inspection party split up, with Whitehair and Rhodes proceeding to what they believed was a return aircourse off the Burrell Mains track. They observed company fireboss Wayne Fink apparently monitoring a pump for methane. Fink testified that in fact he was taking a methane reading at the intake evaluation point at the water's edge. Whitehair saw that the switchbox was not enclosed and asked Fink if he knew that this was a nonpermissible switchbox in return air. Fink admitted it, and said that was why he was there, monitoring the methane. Inspector-trainee Whitehair went to find Inspector Burkey, and returned with Burkey and Montgomery to the switch. Burkey issued the § 104(d)(2) order contested herein, and said he wanted power removed from the pump. Neither Montgomery nor Fink at that time, or afterwards when the order was discussed outside, claimed that the pump was not in return air. None of the members of the inspection party conducted any test to determine the direction of

the airflow. It was apparently assumed by all that the area was in return air.

The map filed by Helen with MSHA as part of its ventilation plan on January 16, 1987, and approved on January 29, 1987, showed the area in question to be in return air. There is a dispute in the testimony as to the location of pump with reference to this map. Although it is not decisive, I accept the testimony of Joseph Dunn, Helen's General Mine foreman, as to the location of the pump. (Inspector Whitehair located the pump and switchbox at areas marked in red "Y" and "P" on page 3 of Government's Exhibit 1; Mr. Dunn stated that they were located at the point marked in blue "X" on the same document. Both these areas were, according to the map, in return air. Both were, in fact, according to Dunn, in intake air).

On the day following the issuance of the order, Mr. Dunn went to the area involved and performed a smoke tube test which showed that the split was intake and not mixed with return air. Mr. Dunn stated that this area had always been in intake air. He testified that the map submitted with the ventilation update omitted a wall, and mistakenly showed an area to the left of the Burrell Mains area as being in return air (double arrows on the map). In fact, Dunn testified, it was in intake air from the split in the old face area. The air does not pass any working faces or ventilate any gob area; it does not mix with any return air. Dunn stated that this was a mistake on the part of the engineers who prepared the map, and of Dunn who reviewed it. Mr. Dunn's testimony on the basic factual issue was consistent and convincing. Largely on the basis of his testimony, I find as a fact that the cited pump switchbox was on August 31, 1987, located in intake air.

REGULATION

30 C.F.R. § 75.507-1(a) provides in part:

> All electrical equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible . . .

CONCLUSIONS OF LAW

Helen Mining Company is subject to the provisions of the Mine Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding. The nonpermissible pump switchbox cited in order 2881028 on August 31, 1987, was located in an intake aircourse. Therefore, a violation of 30 C.F.R. § 75.507-1(a) has not been established.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2881028 issued on August 31, 1987, under section § 104(d)(2) of the Act is VACATED. The contest is GRANTED.

2. The Secretary has failed to establish a violation of the mandatory standard alleged and her petition for civil penalty is DISMISSED.

James A. Broderick
Administratiave Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 21 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-165-D
ON BEHALF OF	:	MSHA Case No. MORG CD 87-27
DAVID H. MILLER,	:	
Complainant	:	Ireland Mine
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor on behalf of David H. Miller against the respondent pursuant to section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). The complaint alleges that on or about September 11, 1987, Mr. Miller was discriminated against because the respondent interfered with his right as a representative of miners to accompany a Federal mine inspector during his inspection of the mine. The complaint was subsequently amended by the Secretary to include a proposal for an assessment of a civil penalty against the respondent for the alleged act of discrimination.

The respondent filed a timely answer denying that it discriminated against Mr. Miller, and the matter was scheduled for a hearing in Wheeling, West Virginia, on Tuesday, June 14, 1988. However, the hearing was cancelled after the parties advised me that they had reached a proposed settlement of the case. The parties have now filed a joint motion for approval of the proposed settlement.

Discussion

In support of the proposed settlement disposition of this case, the Secretary has submitted information pertaining to the

six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the complainant David H. Miller states that he has voluntarily consented to the agreement reached on his behalf by the Secretary, and that he will withdraw his complaint upon the respondent's posting of a notice to employees that it will comply with the provisions of sections 103(f) and 105(c) of the Act, and payment of a civil penalty assessment in the amount of $2,000 to MSHA's Office of Assessments. The respondent has agreed to post the requisite notice at the mine and to pay a civil penalty assessment of $2,000.

In further support of the settlement, the parties state that Mr. Miller received no disciplinary action from the respondent as a result of his attempts to exercise his rights as the walkaround representative of miners and that the respondent did not document the occurrence in question for purposes of placing a record of the incident in his personnel file. Under these circumstances, the parties are in agreement that the gravity of the violation should be minimally reduced from the initial proposed range of $2,500 to $3,000 to $2,000.

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, including Mr. Miller, I conclude and find that the proposed settlement reflects a reasonable resolution of the complaint filed by the Secretary on Mr. Miller's behalf, and that it is in the public interest. Since it seems clear to me that the parties are in agreement with the proposed settlement disposition of the complaint, I see no reason why it should not be approved. I also find no reason for not approving the reduction of the initial proposed civil penalty assessment.

ORDER

The joint settlement motion filed by the parties IS GRANTED and the settlement IS APPROVED. The respondent IS ORDERED to fully comply with the terms of the settlement and to immediately post the aforementioned notice at a conspicuous place at the mine. The respondent IS FURTHER ORDERED to pay to MSHA a civil penalty assessment of $2,000, for the violation in question, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, and full compliance with the terms of the settlement, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 21 1988

DAVID JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 88-135-D
v.	:	BARB CD 88-20
	:	
JERICOL MINING INC., Respondent	:	Darby's Mine

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, David Johnson, requests approval to withdraw his Complaint in the captioned case on the grounds that he has reconsidered his decision to proceed with the Complaint and no longer desires a hearing concerning this matter. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

October 21, 1988

GREEN RIVER COAL CO., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 87-217-R
v.	:	Citation No. 2828322; 7/15/87
	:	Docket No. KENT 87-218-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 9897267; 7/9/87
	:	Docket No. KENT 87-82-R
	:	Citation No. 2216195; 12/10/86
	:	Docket No. KENT 88-2-R
	:	Order No. 2836094; 9/21/87
	:	Docket No. KENT 87-202-R
	:	Citation No. 2215847; 5/27/87
	:	Docket No. KENT 87-203-R
	:	Citation No. 2215849; 5/27/87
	:	
	:	No. 9 Mine
	:	Mine I.D. 15-13469
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 88-5
	:	A.C. No. 15-13469-03620
v.	:	
	:	Docket No. KENT 88-19
GREEN RIVER COAL CO., Respondent	:	A.C. No. 15-13469-03624
	:	No. 9 Mine

DECISION

Appearances: Flem Gordon, Esq., Gordon & Gordon, Owensboro, KY, for Green River Coal Co.;
Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Secretary of Labor.

Before: Judge Fauver

The above cases, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., were called for hearing at Evansville, Indiana.

Motions to approve settlement and to withdraw some of the cases were considered and granted at the hearing. Accordingly, KENT 87-82-R, KENT 88-2-R, and KENT 87-218-R will be dismissed and the operator will be ordered to pay the following approved civil penalties: $700 each for Order 2215845 and Order 2215846 in KENT 88-5; $700 for Order 2836094 in KENT 88-2-R; and $20 for Citation 9897267 in KENT 87-218-R.

The following matters are pending decision following the hearing and briefs: KENT 87-217-R and KENT 88-19 concerning Citation 2828322 and KENT 87-202-R, KENT 87-203-R and KENT 88-5 concerning Order 2215847 and Order 2215849.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Green River Coal Company is a large coal operator producing coal for sales in or substantially affecting interstate commerce.

Order 2215847

2. On May 27, 1987, MSHA Ventilation Specialist Louis Stanley inspected working section 4 of Green River No. 9 mine. There were six active entries in the section.

3. In No. 3 entry, Specialist Stanley observed an air curtain that appeared to him to be improperly hung in that it did not cover enough of the crosscut to direct sufficient air to the working face. The curtain extended only five to eight feet across the crosscut. Specialist Stanley believed the curtain would have to be extended to nearly the full width of the crosscut to direct adequate air to the working face. He believed the condition was obvious and should have put the foreman on notice to check the ventilation and correct the curtain.

4. Based upon his suspicion about the curtain, Specialist Stanley took an air reading in the entry. He used a smoke tube to determine the speed of air in the entry and calculated the volume of air after measuring the air opening behind the air curtain. The air opening was 5 x 4 feet. His calculations showed 1,500 cfm of air. Because the regulations (30 C.F.R. § 75.301-1) require a minimum of 3,000 cfm at each working face, Speciatist Stanley issued Order 2215847.

5. Specialist Stanley measured the air for methane in the same entry and found .9 percent methane.

6. Specialist Stanley asked the section foreman, Kelvin Smelly, whether he had checked the ventilation. The foreman told him that he had. Specialist Stanley asked to see Mr. Smelly's calculations. Mr. Smelly said, "I don't have any." Specialist Stanley then asked him, "How could you calculate this?" and he replied, "I calculated it in my head." Specialist Stanley then asked what figures he had used for the air opening, and Mr. Smelly replied, "two foot by five foot."

Order 2215849

7. On May 27, 1987, Specialist Stanley observed accumulations of loose coal along the ribs of entries No. 2 through No. 7 in working section 4, extending from the working faces outby 60 to 70 feet. The loose coal ranged from 12 to 30 inches deep and one to four feet wide.

8. Based upon the conditions he observed, Specialist Stanley's expert opinion was that the loose coal had accumulated over three work shifts.

9. Methane was detected in each of the six entries, ranging from .7 to 1.15 percent.

Citation 283822

10. On May 15, 1987, MSHA Inspector George Newlin took methane readings in the return air course off the No. 1 unit in the old headings of the No. 1 return. He detected methane of 2.13 percent in one room at spad 2100 and 1.95 percent in another room at spad 2100.

11. The Green River No. 9 mine liberates over one million cubic feet of methane in 24 hours.

DISCUSSION WITH OTHER FINDINGS

Order 2215847

The company does not deny a violation of the ventilation standard (30 C.F.R. § 75.301-1), which requires 3,000 cfm, but challenges Specialist Stanley's finding that the violation was "unwarrantable."

Specialist Stanley found 1,500 cfm in the entry. Mr. Smelly contended he had measured over 3,000 cfm shortly before the inspector's test.

I credit Specialist Stanley's testimony and notes concerning this matter. The foreman was present on the section but had not ensured proper ventilation of the face, the curtain was obviously improperly hung, and an accurate air reading showed that the air was 1,500 cfm below the safety standard of 3,000 cfm. In addition, there was .9 percent methane in the entry. I find that the foreman demonstrated high negligence in operating this section without ensuring adequate ventilation. The improper hanging of the air curtain was the sole reason for the 50% loss of the required ventilation. Given the obvious condition of the curtain, the history of methane buildups in this mine, and the sources of ignition in the working section, the foreman's conduct exceeded ordinary negligence when he proceeded to work the section without adequately measuring the air and correcting any deficiency. I find that the foreman either did not take an air reading or, if he took one, he used a patently inadequate figure for the air opening, i.e., 10 sq. ft. instead of the accurate figure of 20 sq. ft. measured by the inspector. The inspector was justified in finding an "unwarrantable" violation of the ventilation standard.

Considering the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $700 is appropriate for this violation.

Order 2215849

The violation charged is not contested, but the company contends that it was not an "unwarrantable" violation.

I credit the inspector's testimony and notes concerning this matter.

Considering the obvious condition of the accumulations of loose coal, the fact that it took several shifts to accumulate the amount of loose coal observed, and the failure of the company to comply with its own cleanup policy, I find that the inspector was justified in finding a high degree of negligence. This satisfies the Commission's criteria for an "unwarrantable" violation.

The company relies on the inspector's acceptance of the word "inattentive" during cross examination, in contending that the violation was not "unwarrantable." However, the inspector's personal interpretation of the word "inattentive" is that it means "no attention at all" and "basically the same" as "aggravated conduct or high negligence" (Tr. 37-38). This is consistent with his finding of an "unwarrantable" violation based on the facts he observed.

Considering the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $800 is appropriate for this violation.

Citation 283822

This citation was issued by Inspector George Newlin on May 15, 1987, for a violation of 30 C.F.R. § 309(b) on the ground that 2.3 percent and 1.95 percent methane readings were found in the return air course off the No. 1 unit in the old headings of the No. 1 return. Inspector Newlin took methane readings with an approved methane monitor in numerous areas throughout the old headings. He took bottle samples in two rooms and found 2.13 percent methane in one and 1.95 percent methane in the other. The buildup of methane was caused by a rock fall in the return air course. It had been two or three days since the headings were last inspected by the company. The headings are required to be walked and inspected once a week. The area was due to be sealed within a week.

If left uncorrected, the condition probably would have caused a back up of methane to the active unit.

Green River Coal Company No. 9 mine liberates in excess of one million cubic feet of methane in a 24 hour period. Further build up of methane could have resulted in an explosive mixture of methane. The mine has a history of prior violations concerning methane.

Section 75.309(b) of 30 C.F.R. provides that if, when tested, a split of air returning from a working section contains 1.5 percent of methane or more, the area of the mine endangered by methane shall be safeguarded "until the air in such split shall contain less than 1.0 volume per centum of methane."

A "split of air" means a separate air circuit, e.g., when mine workings are subdivided to form a number of separate ventilating districts; "the main intake air is split into the different districts of the mine" and later "the return air from the districts reunite to restore the single main return air current" (A Dictionary of Mining, Mineral, and Related Terms (Bureau of Mines, U.S. Department of Interior 1968) p. 1201). The locations where the inspector found methane readings of 2.13 and 1.95 percent were in a "split of air returning from a working section."

The methane buildup was caused by a roof fall, and not negligent conduct by the company.

The safety standard requires the operator to take certain corrective action "If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane." Since the company's last methane test of the cited area did not show this amount of methane, the Secretary has not shown a violation of § 309(b) as charged in the citation. In other words, a duty to safeguard the area by the steps outlined

in § 309(b) was not triggered by a prior test showing methane of 1.5 percent or higher.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Green River Coal Company violated the safety standards as alleged in Order 2215847 and Order 2215849.

3. The Secretary failed to prove a violation as charged in Citation 2828322.

ORDER

WHEREFORE IT IS ORDERED that:

1. Docket Nos. KENT 87-82-R, KENT 88-2-R, and KENT 87-218-R are DISMISSED.

2. Order 2215847 is AFFIRMED.

3. Order 2215849 is AFFIRMED.

4. Citation 2828322 is VACATED.

5. Green River Coal Company shall pay the above civil penalties of $3,620 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 24 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOSEPH GABOSSI, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 86-24-D Deserado Mine
v.	:	
WESTERN FUELS-UTAH, INC., Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

On August 15, 1988 the Commission ruled that Joseph Gabossi's complaints to mine management concerning the company's reporting structure constituted an activity protected under the Act and, accordingly, the Secretary may have established a case of unlawful discrimination. Further, the Commission noted that "(i)t remains to be determined whether, on the basis of this record, Western Fuels successfully rebutted the Secretary's case or affirmatively defended against it." Slip op. at 6, 7.

The Commission order of remand basically restates its established precedent. Specifically, an operator may rebut the prima facie case by showing that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797 - 2800, rev'd on other grounds sub.nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 81), Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC 813 F.2d 639, 642 (4th Cir. 1987), Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (Specifically approving Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

In its order of remand the Commission directed the Judge to make additional findings of fact and to analyze such findings in accordance with applicable case law. In particular, the Commission directed the Judge to consider the incident of November 9, 1985 involving Gabossi and Mine Manager Upadhyay as well as the events surrounding Gabossi's discharge on January 30, 1985.

The Judge took the issues as submitted on the basis of the present record and briefs (Order, August 18, 1988).

Based on the evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following and I make these:

Findings of Fact

Incident of November 9, 1984

1. On November 9, 1984, a Friday, Upadhyay and Gabossi were discussing an increase in Gabossi's duties. This increase involved a computer technician and all of the belts from the mine to the silos (Tr. 30).

2. Gabossi felt the time was opportune so he brought up the issue of the separation of the company's departments as well as their [lack of] coordination. Gabossi showed Upadhyay Emmons' letter (relating to Gabossi's mine foreman duties under Colorado law) (Tr. 31, Ex. C5).

3. As soon as he read the letter Upadhyay got "instantly" mad and he told Gabossi that if he didn't like it he should quit; that when Western Fuel makes a decision they're going to run it the way they want no matter who else doesn't like it. It was a heated discussion (Tr. 30, 31).

4. On November 11th [1/] Gabossi was called to Upadhyay's office. Upadhyay was very mad that he (Gabossi) had called the State of Colorado. Upadhyay put Gabossi on probation for not getting along with senior staff members. A heated discussion followed (Tr. 32,33).

Upadhyay stated the probation would be for an indefinite length of time (Tr. 35).

1/ The testimony reflects this conversation also took place on November 12 (Tr. 34).

5. The Upadhyay written reprimand to Gabossi was given to him on November 16th (Tr. 35, Ex C3).

6. The first paragraph of the reprimand discusses Gabossi's lack of willingness to work harmoniously (Tr. 36, Ex. C3).

Respondent's evidence casts the "big blowup" in a different light. Specifically, Upadhyay had gone to Gabossi's office in the change house to discuss a monitoring system, an on-site research student and duties concerning all of the silos. These were to be Gabossi's new responsibilities (Tr. 198, 199, 472, 473).

As he started to discuss it Gabossi brought up a question concerning his house and the company's failure to purchase it. Upadhyay said the company wasn't going to buy Gabossi's house. Gabossi then "blew up" and the meeting became a name calling contest with Gabossi referring to Upadhyay as a "worst mine manager" and also to "caste systems" (Tr. 198, 199, 473, 474). Immediately after the "blowup" Gabossi gave Upadhyay the State of Colorado letter (Tr. 474, Ex. C5). Upadhyay said the letter didn't mean anything. While Upadhyay said he didn't think much of Gabossi he didn't raise his voice. Upadhyay left the room and took the letter with him (Tr. 474).

Over the weekend Upadhyay contacted his supervisor seeking his authority to terminate Gabossi. But the counter suggestion was that Gabossi be put on probation. The probation ensued.

Discussion and Evaluation

I credit Gabossi's version of the incident of November 9th. The two men were discussing a computer technician and the silos, both involving additional duties for Gabossi. These subjects would, by then, be an almost automatic entry to Gabossi's arguments with management over the company's failure to co-ordinate underground mining activities. Such safety-related complaints with management were continuing, extensive and frequent. Further, they involved Gabossi's concern for the possible revocation of his mine foreman's papers.

In addition, I reject Upadhyay's evidence. His version is less than unequivocal (Transcript at 475). Further, the house repurchase agreement in the total record was relatively insignificant when compared with the safety related complaints focusing on the company reporting structure.

Respondent argues 2/ that Gabossi was not motivated by

2/ Brief filed before Commission at 3, 4.

safety concerns but by the house repurchase hassle. I am not persuaded. As stated above, the house repurchase agreement and its apparent breach was relatively insignificant in the overall facts. I agree that certain facts are clearly confirmed by Gabossi. Specifically, Emmons did advise him that he must file a complaint in writing before Emmons would act and, further, Gabossi had originally applied for the position of mine manager. However, these factors do not cause me to conclude that Gabossi's complaints as to the reporting structure were other than safety related.

Incident involving Gabossi's probation and discharge

Based on the credible record I make the following:

Findings of Fact

1. Gabossi was placed on probation on November 12. A formal letter dated November 16, 1984, recites that Gabossi's performance had not been satisfactory. In detail, it recites as follows:

> Your willingness to work harmoniously under the organization structure put into effect by Western Fuels has been negative. You have repeatedly objected to the idea of Maintenance Superintendent being responsible for underground maintenance.
>
> You have demonstrated your inability to work harmoniously with other division heads and employees at the Deserado Mine.
>
> Your attitude towards other division heads, work ability and habits have always been negative. I have noticed this personally and also have heard from other people from other companies.
>
> Your attitude towards Western Fuels, its management and policies has been less than desirable.
>
> You getting into arguments with me over matters in which you should not be even involved with.
>
> I also would like to make it clear to you that once the decision is made by me on any matter that becomes a policy at the Deserado Mine, you are expected to abide by them irrespective of what your opinion was on that matter.
>
> (Exhibit C3)

2. After November 12, 1985 Upadhyay was cool but civil to Gabossi (Tr. 42).

3. On January 21, 1985 Gabossi brought to Upadhyay's attention the fact that a mechanic was falsifying MSHA electrical inspection books. Gabossi wanted the electrician fired (Tr. 42).

4. After January 21, 1985 Upadhyay wouldn't talk to Gabossi (Tr. 42, 43).

5. There were no further heated discussions, except for the underground safety problem (Tr. 43).

6. There were no further heated discussions between Gabossi and any other supervisors or department heads (Tr. 43).

7. After he was put on probation Gabossi became more quiet at staff meetings (Tr. 44).

8. On January 30th Gabossi went to Upadhyay's office. Upadhyay requested his resignation. When the company refused to repurchase his home, Gabossi refused to resign. At that point Upadhyay fired Gabossi. This meeting generated a heated discussion (Tr. 45).

At the same time Gabossi received a termination letter. It read as follows:

> Western Fuels-Utah, Inc. at the Deserado Mine needs to have employees who can act together as a team, especially now in view of our small workforce. Your efforts have not been directed towards that end. For this reason, your employment shall be terminated at Western Fuels-Utah, Inc. effective immediately.
>
> In an effort to be fair and equitable, you shall receive your normal compensation through February 15, 1985. Your current health insurance shall be terminated March 1, 1985 and if you desire to convert to a private policy it will be incumbent on you to investigate this privilege.
>
> (Tr. 45, Ex. C2)

9. Gabossi told Upadhyay it was pretty bad that he "got run off" for showing him a letter from the State of Colorado and for his concern for the safety and health in the coordination between departments (Tr. 46).

Respondent's evidence casts the events of Gabossi's termination along different lines. It indicates that on January 29, 1985, A.B. Beasley gave his letter of resignation to Upadhyay (Tr. 484, 485). Beasley stated to Upadhyay that he was resigning because he couldn't work with Gabossi (Tr. 485).

When Beasley left (after the conference), Upadhyay concluded people were leaving because of Gabossi's inability to work with them. So Upadhyay talked to the company's top officer. Permission was then granted to terminate Gabossi (Tr. 486, 487).

Upadhyay called Gabossi to his office and gave him the option of resigning. When Gabossi refused to resign Upadhyay fired him (Tr. 488).

Gabossi said "Bullshit, you cannot get away with it, you are the worst mine manager I've ever worked for." Upadhyay said he didn't want to hear anything further so he opened the door and Gabossi left (Tr. 488).

Discussion and Evaluation

A conflict exists in the two versions of the evidence concerning the events at the time Gabossi was fired.

Basically, Gabossi contends he was fired because he was not a "team player." That is, his long and continuing conflict with management over its inadequate reporting structure finally removed him from "the team."

On the other hand, respondent's position is that the company fired Gabossi because of Beasley's conflict with Gabossi which caused Beasley to resign. In sum, Upadhyay did not look forward to obtaining a new maintenance supervisor and later losing his services due to Gabossi's conflicts with management and whoever might be the maintenance supervisor.

On these credibility issues I credit Gabossi's version. The termination letter recites the company needs employees "who can work together as a team." Further, Gabossi's efforts have not been directed "towards that end." Gabossi was not a "team member" because he refused to go along with the company's organizational plan. This issue, a safety related complaint, predominates in the evidence. The complaint was made ten to fifteen times. As Gabossi indicated, it got to be a "headache." But Upadhyay did not seem to be willing to work on the problem (Tr. 26, 126).

I reject respondent's claim that Gabossi was fired because Beasley resigned due to his conflicts with Gabossi. It is true there were conflicts between Beasley and Gabossi, but such conflicts did not cause Beasley's resignation (Tr. 430, 435). Beasley's resignation occurred for the reasons stated in his letter of resignation; namely, higher salary, larger community and more resources with which to meet the challenges of a maintenance superintendent (Ex. R4). If the Gabossi conflicts with Beasley were the "primary reason" [3/] for Beasley's resignation there should have been in the very least a vague reference to it in Beasley's resignation letter. In sum, I find Beasley's letter of resignation to be much more persuasive than Beasley's and Upadhyay's contrary oral testimony at the hearing.

The Commission has ruled that Gabossi's safety related complaints concerning the company's reporting structure may have been an activity protected under the Act. Slip op. at 2. For the reasons stated herein I conclude such complaints were, in fact, safety related.

Respondent asserts [4/] that the Judge in his initial decision specifically found that respondent would have discharged Gabossi in any event for his unprotected activity. Respondent sets forth a portion of the Judge's decision. Slip op. at 25. (August 21, 1988).

Respondent has misconstrued the Judge's initial decision. In that decision I ruled that Gabossi's unprotected activity "was his continued clash with management over the reporting structure." The trial Judge's narrow view of the Act's protective umbrella of the anti-discrimination provisions of section 105(c)(1) was held to be erroneous in the order of remand. Slip op. at 1, 2 (August 15, 1988).

On the facts stated above, I conclude that Gabossi was discharged because of his protected activity.

Further, the operator's defense had not prevailed. The operator was not motivated by an unprotected activity when it fired Gabossi.

3/ Respondent's brief before Commission at 4.

4/ Brief filed before Commission at 8.

Even if I were to credit respondent's version that Beasley triggered Gabossi's firing (which I do not), I would nevertheless hold that the operator's discharge of Gabossi was motivated in part by his protected activity; namely, his prolonged complaints over the company's reporting structure.

The complaint of discrimination should be affirmed.

Damages

The Senate Report, with respect to relief in section 105 cases, states as follows:

> It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.
>
> S.REP.NO. 95-181, 95th Cong., 1st Sess. 37 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 625 (1978).

Gabossi does not seek reinstatement. The claim for damages here focuses on salary, medical and dental expenses, the failure of the respondent to repurchase Gabossi's home and incidental costs related to refinancing and selling the house.

Salary

When Gabossi was fired his annual salary was $52,000. His termination notice indicates his normal compensation was paid through February 15, 1985. (Ex. C2). The uncontroverted evidence further shows the employees on the payroll received a 5.8 % pay raise on January 21, 1985 (Tr. 50, 167-169, Ex. C11). Gabossi did not receive the increase because he was on probation. On the uncontroverted evidence I conclude Gabossi's lost wages are:

Six months without employment (February 15 to August 15) @ $4,584.66 per month, or $27,507.96.

The monthly salary includes the 5.8 % increase given other employees on January 21, 1985.

Other Appropriate Relief

It must be determined whether the additional special damages which Complainant seeks may be awarded as "other appropriate relief" under section 105 (c)(2). In the words of the Senate Report quoted, supra; such damages are awarded when they are sustained "as a result of" the discrimination. It has been held that in order to be recoverable, damages must be proved to be the proximate result of the complained wrong. Classic Bowl, Inc. v. AMF Pinspotter, Inc. 403 F.2d 463 (7th Cir. 1968). The legal concept of proximity is applicable to ascertain and measure damages. The necessary and appropriate limits of judicial inquiry are served by disregarding remote effects. Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 225 F.Supp. 332 (N.D. Ill. 1963). UMWA on behalf of Moore, et al v. Peabody Coal Company, 6 FMSHRC 1920 (1984).

Medical and Dental Expenses

The medical and dental expenses claimed here are in the amount of $1,313. The evidence shows Gabossi apparently did not present any claims to the insurance carrier within 30 days after his discharge (during the period when his policy remained in effect). However, if Gabossi had not been terminated his insurance coverage would have been in effect. Accordingly, I believe it is appropriate that these additional special damages of $1,313 be awarded as "other appropriate relief" under section 105(c)(2) of the Act.

Repurchase of Gabossi's House

The evidence shows that respondent agreed to repurchase Gabossi's house in Rangely (Colorado) if he left the company within three years. The repurchase price was to be for the amount Gabossi had paid for it (Tr. 55, 56, 169-171).

The original house loan had been guaranteed by respondent. The loan was immediately due when he was terminated. In order to prevent foreclosure Gabossi secured a new loan. I calculate Gabossi's damages as follows:

Purchase Price 2-17-83	$119,000
Actual Resale Price	114,000
Loss due to respondent's failure to repurchase house	$ 5,000

Inasmuch as respondent agreed to repurchase the house at Gabossi's "purchase price" (Tr. 56), this award does not encompass improvements of $1,273.09 made by Gabossi. Respondent should not be held liable for a loss it did not agree to pay. In other words, I believe the loss incurred by Gabossi from the house improvements are remote damages.

Additional house expenses include:

Fees for abstract company	$ 223.25
Real estate agent fee	2,500.00
Interest paid to secure loan to prevent foreclosure	3,015.85
Total incidental house expenses	$5,739.10

In sum, the total damages are $39,560.06.

For the foregoing reasons I enter the following:

ORDER

1. The complaint of discrimination filed herein is sustained.

2. Respondent is ordered to pay to complainant within 40 days of the date of this decision the sum of $39,560.06 with interest. Said interest should be calculated by using the formula set forth in the case of Secretary ex rel Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983).

John J. Morris
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 25 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 88-92-A A.C. No. 15-13469-03643
v.	:	Green River No. 9 Mine
GREEN RIVER COAL COMPANY, Respondent	:	

DECISION

Appearances: Flem Gordon, Esq., Gordon & Gordon, Owensboro, KY, for Green River Coal Co.;
Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Secretary of Labor.

Before: Judge Fauver

This is a civil penalty case under § 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. At a hearing of a companion contest case, Docket No. KENT 88-2-R, in Evansville, Indiana, the parties proposed a settlement agreement to include payment of the penalty proposed herein and dismissal of the contest case. The matter was considered under the criteria for civil penalties in § 110(i) of the Act and approved.

This Decision confirms the bench decision at the hearing, approving the settlement.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the approved civil penalty of $800 within 30 days of this Decision and upon such payment this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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OCT 25 1988

LOCAL UNION 2333, DISTRICT 29, UNITED MINE WORKERS OF AMERICA (UMWA), Petitioner	:	COMPENSATION PROCEEDING
	:	Docket No. WEVA 86-439-C
v.	:	
	:	Beckley No. 2 Mine
RANGER FUEL CORPORATION, Respondent	:	

DECISION

Appearances: Webster J. Arceneaux, III, Esq., McIntyre, Haviland & Jordan, Charleston, West Virginia and Joyce Hanula, United Mine Workers of America, Washington, D.C. on behalf of the Petitioner;
John T. Scott, III, Esq., Crowell & Moring, Washington, D.C. on behalf of the Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission for further proceedings consistent with its decision issued May 13, 1988. The case was initiated by the United Mine Workers of America (UMWA) under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to obtain compensation from the Ranger Fuel Corporation (Ranger).1/ The UMWA seeks compensation pursuant to the third sentence of section 111 for an idling of miners on May 30 and 31, 1986, following the issuance by the Secretary of Labor of "imminent danger" Withdrawal Order No. 2577281, issued pursuant to section 107(a) of the Act. The issues now before me are whether the underlying withdrawal order is "final" within the meaning of section 111 and, if so, whether that order was issued for a violation of a mandatory health or safety standard, i.e. whether there was a causal nexus between the fact of violation and the withdrawal order.

1/ Section 111 provides in part as follows:

> [1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107 all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless

The UMWA maintains that the Section 107(a) withdrawal order that idled the miners had become final upon Ranger's failure to contest it within the 30 day time period set forth in section 107(e)(1) of the Act.2/ Ranger admits that it did not apply for review of the order under those statutory provisions and acknowledges that the order was therefor "final" between the Secretary of Labor and itself. It argues however that the order is not "final" as between itself and the UMWA and that issue can now be lititgated in this proceeding under section 111 of the Act.

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cont'd fn 1/
of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled but for not more than the balance of their shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser....

2/ Section 107(e)(1) provides as follows:

Any operator notified of an order under this section or any representative of miners notified of the issuance, modication, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forth with afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

Section 111 of the Act does not in itself however provide any specific right of action or proceeding to challenge the section 107(a) withdrawal order. To determine whether such an order is "final" within the meaning of section 111, reference must therefore be made to the specific provisions of the Act authorizing the form of action over which the Commission may judicially preside. See Kaiser Coal Corporation v. Secretary and UMWA, Docket WEST 88-131-R, decided September 27, 1988. In this case, since it involves an order issued under Section 107(a) of the Act, the relevant provisions are found in Section 107(e) of the Act. Since no application for review of the order herein was filed in any such proceeding that order is now "final" within the meaning of Section 111.

Moreover the Commission, by its earlier ruling in this case (10 FMSHRC 612) would appear to preclude litigation of the underlying order. In dealing with the issue of whether Ranger's payment of the civil penalty proposed for the underlying violation of 30 C.F.R. § 75.329 and its failure to have contested the citation charging that violation precluded it from contesting the violation in this compensation proceeding, the Commission stated as follows:

> In addition, we agree with the Secretary that allowing an operator to challenge in a compensation proceeding the fact of violation despite having paid the relevant civil penalty would improperly place miners and their representatives in a prosecutorial role. The Secretary, as enforcer and prosecutor of the Mine Act, is a party to a section 105 enforcement proceeding but not to a section 111 compensation proceeding. [citations omitted] If an operator were permitted to make the kind of challenge advocated by Ranger, miners and their representatives would be required to perform functions properly resting within the Secretary's domain in order to prove the underlying violation or the validity of the citation or order in which the allegation of violation was contained. Given the unified scheme of the Mine Act, we find unconvincing Ranger's assertion that it would not be inconsistent to allow it to challenge the fact of violation in a compensation proceeding even though it chose not to contest the allegation of violation in an enforcement proceeding.

The situation herein is closely analagous and the underlying principle the same. Clearly the Commission would find it inappropriate to "place miners and their representatives in a prosecutorial role" to litigate in a section 111 compensation proceeding what, in essence, is the validity of the "imminent danger" withdrawal order. I am therefore constrained to find that Withdrawal Order No. 2577281 became final upon Ranger's failure to apply for review or contest that order within the time set forth in section 107(e)(1) of the Act and that the order and the underlying issue of whether that order was based upon an "imminent danger" cannot now be contested in this compensation proceeding under section 111 of the Act. The assertion of "imminent danger" contained in the order must accordingly be regarded as true. See Old Ben Coal Co., 7 FMSHRC 205 (1985).

The second issue before me is whether a causal nexus existed between the violation of a mandatory standard and the "imminent danger" order. In its earlier decision in this case the Commission held that section 104(a) Citation No. 2577283, which charged a violation of a mandatory standard, was final and that it could not now be relitigated. 10 FMSHRC at 619. Accordingly in the context of this case the assertions of violation in that citation must be accepted as true. Old Ben Coal Co., supra. Thus it is established and proven that on May 29, 1986, at the Ranger Beckley No. 2 Mine "the bleeder system failed to function adequately to carry away an explosive mixture of methane in the tail entries of the 7 East Longwall Section (013-0) starting at survey station 3824 in the No. 3 entry and extending inby for at least 500 feet". (See Petitioner's Exhibit No. 2)

The specific issue remaining is whether these conditions establishing a violation of the mandatory standard were sufficiently related to the existence of the "explosive mixture of methane gas in excess of five percent ... present in the Seven East 0-13-0 Section in the No. 3 entry side of the longwall beginning at Spad No. 3824 and extending inby" [as charged in the section 107(a) withdrawal order] so as to constitute the required causal nexus. As previously noted, in evaluating the evidence in this regard the allegations in the withdrawal order must also be accepted as true. Old Ben Coal Co., supra. I therefore disregard any evidence conflicting with the relevant allegations of fact set forth in Citation No. 2577283 and Order No. 2577281.

Given these established facts and considering the credible testimony of the issuing inspector, William Uhl, it is clear that the required causal nexus did in fact exist.[3/] Inspector Uhl testified that while conducting his inspection on May 29, 1986, he heard what he considered to be a major roof fall in the gob area and opined that this was the underlying cause for the excess methane cited in the withdrawal order. Uhl also testified however that these methane levels which led to the issuance of the withdrawal order would not have been present had the cited bleeder system been working properly. According to the expert testimony of Inspector Uhl then, the inadequate bleeder system was also a factor in causing the excess methane charged in the withdrawal order.

Ranger Senior Safety Supervisor, Ken Purdue, disagreed with Uhl. He testified that the amount of air in the bleeder system was adequate under MSHA standards and that the inundation of methane in this case was so exceptional and abnormal as to be beyond the capabilities of even an adequate bleeder system.

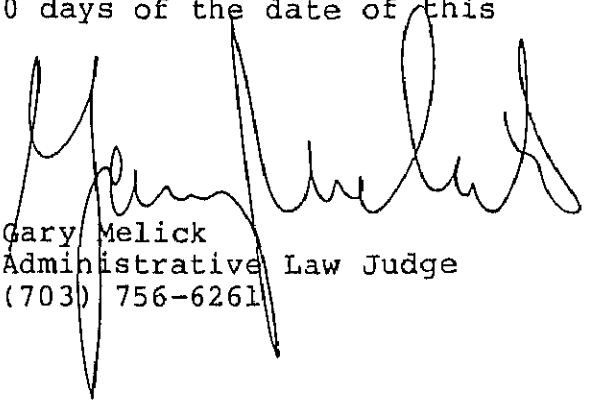
I find however that the testimony of Inspector Uhl is the more credible. According to Uhl if the bleeder system was adequate it would have diluted the excess methane and rendered it harmless. Indeed it may reasonably be inferred that if the bleeder system does not perform the very function it is designed for, then it is not an adequate system. Accordingly I find that the cited violative condition i.e. an inadequate bleeder system, was a causal factor for the existence of the explosive mixture of methane found and cited by Inspector Uhl in the withdrawal order at bar. Under the circumstances the requisite causal nexus has been established.

Accordingly the miners listed in the Joint Stipulation (incorporated by reference hereto) are entitled to compensation equal to the wages which would have been paid to them (set forth in the Joint Stipulation) for work they were scheduled to perform on May 30-31, 1986, but were unable to because they were idled by Withdrawal Order 2577281.

3/ Although the subject citation was issued on June 3, 1986, it is clear that it was based upon conditions existing as early as May 29, 1986. The issuance was delayed by the analysis of an air sample which had been collected on May 29, 1986.

ORDER

Ranger Fuel Corporation is hereby directed to pay compensation in accordance with the Joint Stipulation submitted in this case and incorporated by reference hereto in the stated amounts and to the designated miners, plus interest calculated in accordance with the formula set forth in Secretary v. Arkansas Carbona Co., and Walker, 5 FMSHRC 2042 (1986), within 30 days of the date of this decision.



Gary Melick
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OCT 27 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-119
	:	A.C. No. 36-07571-03516
v.	:	
	:	JPLMJ Strip Mine
WESTRICK COAL COMPANY, Respondent	:	

DECISION

Appearances: Therese I. Salus, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Raymond Westrick, Owner, Westrick Coal Company, Patton, Pennsylvania, for the Respondent

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) has filed a Petition for Assessment of the Civil Penalty alleging that the Respondent, on July 1, 1987, violated 30 C.F.R. § 77.1710(d). After the Operator (Respondent) filed an Answer, a Prehearing Order was issued on March 11, 1988, to which the Respondent did not comply. Subsequently on April 11, 1988, Petitioner filed a Motion to Dismiss Respondent's Notice of Contest on the ground that Respondent did not comply with the terms of the Prehearing Order. Respondent did not file any response to Petitioner's motion, and on April 21, 1988, a Show Cause Order was issued, directing Respondent to comply with the terms of the Prehearing Order, or show cause why it should not be held in default for failure to comply with the Prehearing Order. The Show Cause Order further provided that if Respondent shall not file any response by May 2, 1988, a default judgment shall be entered in favor of Petitioner. No response was filed by Respondent, and on May 25, 1988, a Default Decision was entered. On June 24, 1988, Respondent filed a Petition for a Discretionary Review. The Commission, by Order dated July 8, 1988, vacated the Default Decision to allow Respondent to present reasons for failures to respond to the previous Orders, and allow the Petitioner to interpose any objections to relief from the Default Decision. The Order further

provided that, should it be determined that relief from default is "appropriate," the civil penalty issues in this matter should be resolved. Pursuant to the Order and pursuant to Notice, a hearing was held in Indiana, Pennsylvania, on August 18, 1988.

At the hearing, Raymond Westrick, Respondent's owner, testified with regard to the reasons for his failure to respond to the previous Orders. I found persuasive the testimony of Westrick, a non-attorney, who was appearing pro se, that he did not have any office help, was personally involved with many matters dealing with his mine, and had health problems at the time the Orders were received. According to Westrick, his wife signed the registered postal receipt for the Orders concerned, and he described his wife as forgetful, and tending not to give messages. Westrick also testified that he was confused by the various correspondence he had received concerning this and other alleged violations. Taking all these factors into account, as well as Westrick's age, I concluded that it was in the interests of justice, and appropriate, for the case to be heard on the merits. The case was heard on the merits on August 18, 1988. Gerry Boring testified for Petitioner, and Raymond Westrick testified for Respondent.

Citation

Citation 2697967 issued on July 1, 1987, states as follows:

> "Observed two men working in the active 001 pit, repairing a caterpillar bulldozer, and were not wearing hard hats to protect them from falling hazards (debris from the highwall)."

On August 25, 1987, the Citation was modified to a 104(d)(1) Citation.

Regulation

30 C.F.R. § 77.1710 provides as pertinent that each employee working in a surface coal mine shall be required to wear protective clothing and devices including "***(d) a suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. . . ."

Stipulations

1. The J.P.L.M.J. Strip Mine is owned and operated by Respondent, Westrick Coal Company.

2. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the Act.

4. The subject citation, the modification order, and terminations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent on the dates, times and places stated therein. They may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or the relevancy of any statement asserted therein.

5. The Parties stipulate to the authenticity of the exhibits, but not to the relevance nor to the truth of the matters asserted therein.

6. The alleged violation was promptly abated.

7. The J.P.L.M.J. Strip Mine, the only mine operated by Westrick Coal Company, was producing 37,279 annual production tons in 1987.

Finding of Facts and Discussion

Gerry Boring, a MSHA Inspector, testified that on July 1, 1987, when he inspected Respondent's JPLMJ Strip Mine, he observed two men in the pit doing repair work on a dozer. These men were not wearing hard hats. He indicated that there was no hazard of falling rocks to these men from either the highwall, where clearing was performed 100 to 150 feet away, nor was there a hazard of falling objects from the loading of trucks which were hauling dirt from the highwall. However, according to Boring, trucks transporting stones and rocks had, on their way to the haul road, which was at an elevated grade, passed within 15 to 20 feet from and on the same level of the men repairing the dozer. It was Boring's testimony that the trucks, transporting items that varied from pulverized material to rocks weighing a couple hundred pounds, were open at the rear end, had a slight pitch, and were not covered. As such, he opined that as these trucks travel approximately 5 miles an hour over a "rough" road, they could bounce and sway, causing rocks to fly out of the trucks, (Tr. 62), and hit the men on the head, causing a possible fracture to the skull, depending upon the size of the material thrown out of the trucks. With regard to the condition of the road, he testified that Respondent had four or five trucks going back and forth, loading and unloading, and this truck traffic "creates" ruts in the road which is made out of dirt and stone (Tr. 89). He also indicated that there was a hazard to the men in being hit in the head when performing the repair work with wrenches.

According to Boring, one of the men performing the repair work without a hard hat was Alfred Lieb, Respondent's pit foreman. In the opinion of Boring, the latter should be familiar with the requirement with regard to wearing hard hats. Boring opined that Lieb did not show reasonable care in not wearing a hat, and did not set a proper example for the men he had to supervise. However, Boring indicated that he does not know of any such cases where one has been injured due to the lack of wearing a hard hat. He also indicated that he never observed such an incident. Also, on cross-examination, he was asked whether he saw anything that could fall off the side of the trucks, and indicated that he did not recall. Also, on cross-examination, he was asked whether he observed how high the material was piled in the trucks and he indicated that he could not recall.

Raymond Westrick, Respondent's owner, testified that the trucks in question had a bed which sloped down to the cab which had a protector to prevent the stones from hitting the cab. He also indicated that the materials that the trucks were transporting from the overburden contain stones which weighed up to 40 pounds. According to his testimony, the trucks were loaded with buckets, each one containing 6 to 8 tons. He said that the 35-ton trucks were loaded with three buckets, and the 50-ton trucks were loaded with four buckets. He said that he observed the trucks loaded on July 1, 1987, and the biggest piece of rock in the trucks was about 50 to 60 pounds, and the trucks were loaded only about 60 percent. He said that in his opinion, there was no danger of rocks falling out of the trucks, and that he had never observed rocks falling out of the trucks. According to his testimony, loaded trucks traveled from the overburden to the haul road and passed the men in question, who were approximately 175 feet away. He described the surface that the trucks traveled on from the overburden to the haul road as being "smooth as glass" and comprised of solid slate (Tr. 130). He described the surface as being real hard and up to 3 inches thick. He said that the last time it was scraped by a loader was probably the previous day, but that he did not recall. Also, his testimony indicated, in essence, that there was no physical barrier preventing the trucks traveling closer to the men in question while going from the overburden to the haul road and back again.

Based upon the testimony of both witnesses, it appears uncontroverted that uncovered trucks, open in the back, containing materials with rocks up to 60 pounds, were traveling in the pit area at approximately 5 miles an hour. Should these trucks sway or bounce, it is not entirely inconceivable that some rocks might

fall out and hit the men in question, depending upon their distance from the truck. Accordingly, since there is some possibility of this hazard occurring, and that it is not totally impossible, I must conclude that section 77.1710(d), supra, has been violated, in that the men, not wearing hard hats, would be exposed to this hazard.

Petitioner herein has alleged the violation to be significant and substantial. In essence, according to Boring there was a likelihood of a rock being thrown from the uncovered, open-ended trucks based upon their uncovered condition, speed of 5 miles an hour, the rough condition of the road with ruts, and the proximity of 15 to 20 feet from the men in question. However, I found Westrick's testimony more persuasive with regard to the condition of the surface the trucks traveled and the path they took in relation to the men. It does not appear that Boring observed Respondent's operation on more than the one occasion when he made his inspection on July 1, 1987. Neither the contemporaneous notes of Boring (Government Exhibit 4), nor the narrative of the Citation issued on July 1, 1987, contains any description of the road condition, the level of the material in the trucks, or the distance that the men in question were from the path taken by the trucks which were loaded. It would thus appear that Boring's testimony was based upon his current recollection of one visit more than 2 years ago. In contrast, I find Westrick's description of the path taken by the loaded trucks to be more accurate, as he related the path taken to both the haul road and the overhang where the trucks actually did their loading. Also, inasmuch as Westrick was in the pit on a frequent and regular basis, I find his description of the surface more credible. This conclusion is also based upon my observations of his demeanor. Also, although Boring could not recall how high the material was piled in the truck, I find Westrick's testimony that the trucks were filled to only 60 percent of their space more credible, as it was based upon his recollection of the tonnage capacity of the trucks and the number of buckets each truck was loaded. Hence, I find that it has not been established that the road was rough, and that the material in the truck was piled more than 60 percent of the volume capacity. Nor has it been established that the trucks were traveling within 15 to 20 feet of the men, nor has it been established that the trucks traveled in an upgrade from the men in close proximity. I therefore find that it has not been established that there is any likelihood of the hazard of falling rock occurring. In addition, I note that even Boring indicated that, in essence, he does not have any knowledge of men without hats being injured from rocks falling out of trucks in similar circumstances. Also Boring indicated that there was no hazard from material falling on the men from the highwall work or from the loading of the trucks. He indicated that the men might have been injured from the wrenches they were working with.

However, it is clear that this hazard is not within the purview of section 77.1710(d), supra, which refers to a hazard from "falling objects." Further, there is no evidence upon which to conclude that there was a likelihood to any degree of this injury occurring from a wrench. Therefore, for these reasons, I must conclude that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984)).

Petitioner relies upon Secretary v. Turner Brothers, Inc., 6 FMSHRC 2125 (January 1984). However, I do not find Turner Brothers, supra, to be relevant to the disposition of this case at bar. In Turner Brothers, supra, Judge Koutras affirmed a finding of significant and substantial with regard to a violation of section 1710, supra, as the testimony indicated that the miners therein, not wearing hard hats, were exposed to the hazard from falling rocks from the highwall. In contrast, in the case at bar, according to Boring, there was no evidence of any hazard of rocks falling from the highwall.

The citation herein was modified on August 25, 1988, and upgraded to a 104(d)(1) Citation, because, according to Boring, one of the men not wearing a hard hat was Respondent's foreman, who "should be familiar with the requirements with reference to wearing hard hats" (Tr. 80). There was no further evidence adduced with regard to the issue of unwarrantable failure. The Commission has recently held that unwarrantable failure is more than ordinary negligence and requires aggravated conduct. (Emery Mining Corporation 9 FMSHRC 1997 (December 1987)). Inasmuch as the evidence herein has failed to establish a likelihood of a hazard created by falling objects, I conclude that there was no aggravated conduct in Respondent's foreman not having worn a hard hat. Accordingly, I conclude that the violation herein was not caused by Respondent's unwarrantable failure.

As analyzed above, infra, because it has not been established that an injury herein was likely to occur, I conclude that the gravity herein was low. I conclude that Respondent's foreman, Lieb, who did not wear a hard hat, should have been aware of the regulation in question and should have set a better example for the men that he had to supervise. Accordingly, I rate the negligence herein as moderately high. Westrick indicated, in essence, that imposition of a penalty herein would affect Respondent's ability to continue in business as it is ready to go out of business, and that this Citation, along with other Citations that it had received, is forcing it into bankruptcy. However, although he indicated that it was hard to answer whether Respondent had a profit in 1987 and 1986, he indicated that it did pay taxes and that Respondent was always able to pay its employees on time. Accordingly, I conclude that the imposition of a penalty herein

would not affect the Respondent's ability to continue in business. I also have taken into account all the remaining statutory factors as stipulated to by the Parties. Based upon all the above, and especially the low level of gravity herein, I conclude that a penalty of $50 is appropriate.

ORDER

It is ORDERED that the Citation 2697967 is hereby amended to reflect the fact that the violation is not significant and substantial, nor is it a result of Respondent's unwarrantable failure, and accordingly it is amended to a 104(d) Citation. It is further ORDERED that the Respondent shall pay a civil penalty herein of $50 within 30 days of the date of this Decision.

Avram Weisberger
Administrative Law Judge

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 31 1988

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 86-190-R
	:	Order No. 2705915; 2/19/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 86-194-R
	:	Order No. 2705881; 2/20/86
	:	Martinka No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-254
	:	A.C. No. 46-03805-03723
v.	:	
	:	Martinka No. 1
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION UPON REMAND

Before: Judge Maurer

These cases are before me upon remand by the Commission on August 19, 1988, to consider Southern Ohio Coal Company's (SOCCO's) contest of the Secretary's findings that the violation charged in Order No. 2705915 was significant and substantial and resulted from the operator's unwarrantable failure to comply with the notice of safeguard and to assess an appropriate civil penalty. Southern Ohio Coal Co. v. Secretary, 10 FMSHRC 963 (August 19, 1988), reconsideration denied, 10 FMSHRC ___ (September 19, 1988).

After these matters were remanded to me, SOCCO filed a motion with the Commission, essentially for reconsideration, but more specifically to enter a new decision in SOCCO's favor or in the alternative to expand the remand order to me to allow for the taking of further evidence on the general applicability of the subject safeguard. That motion was denied.

I now have before me SOCCO's motion to reopen the proceedings for the introduction of further evidence on the issue of whether Safeguard No. 2034480 sets forth requirements that are generally applicable to coal mines, rather than mine-specific.

The Secretary opposes the motion to reopen. I believe I am bound by the Commission's remand order which was reiterated by the Commissioners in their order of September 19, 1988, denying SOCCO, in the alternative, the more expansive remand order it sought. Therefore, the instant motion to reopen is denied.

As a further housekeeping matter, Docket No. WEVA 86-194-R was disposed of by my decision reported at 9 FMSHRC 273 (February 1987) (ALJ) and was not at issue on review and therefore also pursuant to the Commission's order of September 19, 1988, "need not be subject to further proceedings on remand."

The Significant and Substantial Violation Issue

A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in

accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Starting from the proposition that I have been handed down, i.e., that the safeguard at bar is valid, then it is really uncontested that it and 30 C.F.R. § 75.1403 were violated on the occasion in question.

The safeguard itself is remarkably simple. It flatly states that in this mine (Martinka No. 1), there shall be 24 inches of clearance on both sides of the coal feeders. On February 19, 1986, when Inspector Delovich saw it, there were only 12 inches of clearance between the left coal line rib and the coal feeder for a distance of some six feet. This much is admitted by SOCCO.

The hazard presented by the violation is that there is a reasonable likelihood that an individual walking between the coal feeder and the left rib line while coal was being dumped into the feeder could be crushed between the coal feeder and coal rib if the car dumping coal into the feeder hit the feeder and moved it towards the left rib line. This is precisely the situation the operator contends accounts for the coal feeder being within twelve inches of the rib line in the first instance. I find it to be a reasonably likely occurrence and the most probable cause of the violation itself. I also find that the likely injury to an individual, if the incident occurred, would be of a reasonably serious nature. Accordingly, I find that the violation is a "significant and substantial" one.

The Unwarrantable Failure Issue

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), appeal dism'd per stip., No. 88-1019 (D.C. Cir. March 18, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act."

In this case, the Secretary argues that SOCCO demonstrated a high degree of negligence. I disagree.

The most likely scenerio that led to this violation and the one that I find credible is that the coal feeder was initially set on cribs in the middle of the entry with approximately 24 inches of clearance on each side, in compliance with the safeguard. At some point between the afternoon of February 18, 1986 and the morning of February 19, 1986, when the inspector

observed the violation, the feeder was inadvertantly knocked or pushed towards the left rib line. There were fresh marks on top of the crib blocks which indicated that the back end of the feeder had been moved approximately 12 inches from its original location on the crib blocks. A reasonable assumption is that a shuttle car dumping coal into the feeder, accidently bumped the feeder, moving it approximately twelve inches.

Assuming that this is in fact what happened, there is no evidence of how long before the order was issued that the incident occurred. It might well have been only shortly before the order was issued at 10:00 a.m. on the morning of February 19.

Therefore, I find that the record will not support a finding of aggravated conduct or "high negligence" on the part of SOCCO with respect to this violation. Accordingly, I will modify the § 104(d)(2) order at bar to a citation issued under § 104(a) of the Act, and affirm the significant and substantial violation of 30 C.F.R. § 75.1403 as such.

Civil Penalty Assessment

I conclude and find that the violation was serious, and that the operator's failure to exercise reasonable care to insure compliance with the safeguard constitutes a moderate degree of negligence. I further find that SOCCO exhibited good faith in timely abating the violations.

On the basis of the foregoing findings and conclusions, and taking into account all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found herein is $400.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2705915 properly charged a violation of 30 C.F.R. § 75.1403 and properly found that the violation was significant and substantial. However, the order improperly concluded that the violation resulted from SOCCO's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a § 104(d)(2) order. Accordingly, Order No. 2705915 IS HEREBY MODIFIED to a § 104(a) Citation and AFFIRMED.

2. The Southern Ohio Coal Company IS HEREBY ORDERED TO PAY a civil penalty of $400 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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